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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 718

BRAEBURN SECURITIES CORPORATION,
an Illinois corporation,

Appellant,

vs.

ELBERT S. SMITH, Auditor of Public Accounts of the State of Illinois; LATHAM CASTLE, Attorney General of the State of Illinois; and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Appellees.

On Appeal From the Supreme Court of the State of Illinois.

JURISDICTIONAL STATEMENT.

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Appellees.

On Appeal From the Supreme Court of the State of Illinois.

JURISDICTIONAL STATEMENT.

Appellant, having taken an appeal to this Court in the manner and form prescribed by Rule 10 of the Rules of this Court from the final judgment of the Supreme Court of the State of Illinois, entered by that court on the 18th day of September, 1958 and becoming final when the petition for rehearing was denied on the 24th day of November, 1958, submits this statement, pursuant to Rule 13 (2) of this Court, to show that the Supreme Court of the United States has jurisdiction of this appeal and that it presents a substantial question.

OPINIONS BELOW.

When the trial judge overruled appellees' motion to dismiss this action (R. 3; Abst. 18-21)(1), he stated his reasons for so doing in conformity with Illinois practice (Ill. Sup. Ct. Rule 36 (c); Ill. Rev. Stats. (1957), ch. 110, Par. 101.36). This opinion, as is customary in Illinois, is unreported; however, it is included here as Appendix "A", (*infra*, p. 1a).

The opinion of the Supreme Court of the State of Illinois (R. 6-13) is reported at 15 Ill. 2d 55, 154 N. E. 2d 806, and is included herein as Appendix "B", (*infra*, p. 11a).

(1) The record on appeal contains the abstract of record before the Supreme Court of Illinois at page 3. The Clerk of the Supreme Court of Illinois affixed the abstract to a page of the certified record, numbering this page but not numbering the individual abstract pages. For this reason, in referring to the abstract, references to both the page of the record upon which the abstract appears and to the pages in the abstract which are pertinent will be made in each instance.

JURISDICTION.

Braeburn Securities Corporation, an Illinois corporation, brought this suit at law under the declaratory judgment act of the State of Illinois (Ill. Rev. Stats. (1957), ch. 110, par. 57.1) to obtain a determination that the Illinois "Bank Holding Company Act of 1957" (Ill. Rev. Stats. (1957), ch. 16½, pars. 71, *et seq.*) and the related amendment of Section 5 of the Illinois "Business Corporation Act" (Ill. Rev. Stats. (1957) ch. 32, par. 157.5) were invalid because they denied Braeburn the equal protection of the laws guaranteed by Section 1 of the 14th Amnedment to the Constitution of the United States.

The reasons assigned to support the charges are found in paragraph six, subparagraphs (a), (b) and (e), of the complaint (R. 3; Abst. 5-8). In essence, Braeburn is denied equal protection because these statutes exempt bank holding companies in existence upon the effective date of the Act from their operation while they deny corporations which were not bank holding companies on the effective date of the Act the right to become bank holding companies, although such existing bank holding companies and Braeburn are identically alike in organization and all other powers and privileges conferred by law.

The challenged statutes also prevent Braeburn, and others, from owning, holding and voting shares of capital stock in banks created by the laws of the United States, in excess of the limit prescribed by the Act, thus diametrically conflicting with the policy laid down by the Congress of the United States in the Federal "Bank Holding Company Act of 1956" (12 U.S.C., §1841, *et seq.*) (R. 3; Abst. 1-16).

The trial court overruled appellees' general motion to dismiss, which asserted only the constitutional validity of these Acts (R. 3; Abst. 16, 18-20). When appellees declined to plead further, the trial court entered judgment for Braeburn on the pleadings, finding that the challenged statutes, "violate • • • Sec. I of the 14th Amendment of the Constitution of the United States, and, therefore, are unconstitutional and void" (R. 3; Abst. 20).

On March 7, 1958, appellees appealed to the Supreme Court of the State of Illinois (R. 3; Abst. 32). On September 18, 1958, the Supreme Court of the State of Illinois (the highest court of the state) entered its final judgment which reversed the trial court's judgment without remanding (R. 14), and, on November 24, 1958, denied Braeburn's timely petition for rehearing (R. 16). Copies of the final judgment order, and the order denying the petition for rehearing, are attached hereto as Appendix "C", (*infra*, p. 22a).

On December 23, 1958, Braeburn filed, in the Supreme Court of Illinois, its notice of appeal to this Court. (R. 19-25).

This court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257 (2).

The following decisions sustain the jurisdiction of this Court: *Morey* v. *Doud*, 354 U. S. 457, 1 L. ed. 2d 1485, 1488, 1492, 1493, (a parallel case which invalidated the Illinois Community Currency Exchanges Act, as amended (Ill. Rev. Stats. (1955) ch. 16½, pars. 30-56.3) because it violated the equal protection clause; this Court rejected the Illinois Supreme Court decision in *McDougall* v. *Lueder*, 389 Ill. 141, 58 N.E. 2d 899, holding the same Act valid against a similar attack); *Smith* v. *Cahoon*, 283 U. S. 553, 562, 75 L. ed. 1264, 1272; *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S.

266, 274, 80 L. ed. 675, 679; (this Court has jurisdiction where state statute, on its face, denies equal protection); *Illinois ex rel McCollum* v. *Board of Education*, 333 U. S. 203, 207, 92 L. ed. 649, 656; (federal question actually considered and decided by highest state court); *Hill Packing Co.* v. *City of New York*, 331 U. S. 787, 91 L. ed. 1817 (repugnancy of state statute to federal statute); *Richfield Oil Co.* v. *State Board of Equalization*, 329 U. S. 69, 84, 91 L. ed. 80 (this Court may review determination of operation and effect of state statute); *Brown* v. *Western Ry. Co.*, 338 U. S. 294, 94 L. ed. 100, 102 (judgment is final for purposes of jurisdiction of this Court where motion attacking pleadings for insufficiency in law sustained and dismissal directed); *Milheim* v. *Moffat Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194 (question is substantial when analysis and exposition of this Court's decision is required); *William* v. *Kaiser*, 323 U. S. 470, 474, 89 L. ed. 398, 401 (on motion to dismiss, allegations of petition make *prima facie* showing of denial of constitutional right).

STATUTES INVOLVED.

The Illinois "Bank Holding Company Act of 1957", Laws, 1957, p. 1032 (Ill. Rev. Stats. (1957) ch. 16½, pars. 71 *et seq.*) and Section 5 of the Illinois Business Corporations Act, as amended in 1957, Laws, 1957, p. 1105 (Ill. Rev. Stats. (1957) ch. 32, par. 157.5) are reproduced as Appendix "D" to this Statement, together with the sections of the Federal Bank Holding Company Act of 1956, 70 Stats. 133 *et seq.*, (12 U. S. C. §1841 *et seq.*) to which they are repugnant. (*infra*, p. 24a).

QUESTIONS PRESENTED.[2]

A

DOES AN ACT WHICH HAS FOR ITS DECLARED PURPOSE THE PRESERVATION OF COMPETITION IN THE BANKING SYSTEM AND THE PROTECTION OF THE INDEPENDENCE OF UNIT BANKS UNLAWFULLY DISCRIMINATE AGAINST BRAEBURN, IN VIOLATION OF SECTION ONE, AMENDMENT XIV, TO THE UNITED STATES CONSTITUTION, BY DENYING IT THE RIGHT TO BECOME A BANK HOLDING COMPANY, AS DEFINED IN THE ACT, AND, AT THE SAME TIME, PERMITTING EXISTING BANK HOLDING COMPANIES TO CONTINUE THEIR OPERATIONS WITHOUT REGULATION AND TO INCREASE THEIR DEGREE OF CONTROL OVER SOME OF THEIR AFFILIATES?

Under Sections 2 and 3 of the Illinois "Bank Holding Company Act of 1957" (App. D. *infra*, p. 24a), all corporations which, on the effective date of the Act, owned or controlled 15% or more of the voting shares of each of two or more banks created by the laws of the State of Illinois or by the laws of another state or by the laws of the United States, are classified as "bank holding companies", and are exempted from the operation of the Act, regardless of the number of banks owned and con-

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(2) In addition, a subsidiary question is presented as to whether the challenged amendment to the Illinois Business Corporation Act can stand if the Bank Holding Company Act is invalidated. Moreover, certain questions as to the scope and method of review may be raised during the course of the proceedings. If so, they are preserved by this Appeal (R. 23-4), but are treated here as subordinate and coincidental to those here stated.

trolled on the Act's effective date. The Act makes it lawful for an existing bank holding company to continue the ownership or control of all voting shares held or controlled on the date of the Act, regardless of the number of such shares and the banks controlled thereby. In addition, the Act grants any existing bank holding company the right: (1) To increase its holdings to 5% of the voting shares of any bank, and (2) to acquire additional shares in any bank in which it owned a majority of the voting shares on the date of the Act, to the end that it may acquire all the shares of such bank. Whereas, Braeburn, not being a bank holding company on the effective date of the Act, but desiring to become one, is denied the same right and privilege, although Braeburn and all corporations classified as bank holding companies existing on the date of the Act, are identically alike in organization, capital and all other powers and privileges conferred by law.

B

DOES AN ACT WHICH ON ITS FACE CREATES A CLOSED CLASS BY SINGLING OUT AND EXEMPTING CERTAIN CORPORATIONS ON THE SOLE GROUND THAT THEY WERE, UPON THE EFFECTIVE DATE OF THE ACT, ENGAGED IN THE ACTIVITY PROHIBITED VIOLATE THE EQUAL PROTECTION CLAUSE OF THE XIVth AMENDMENT BY, IN EFFECT, PROHIBITING BRAEBURN AND ALL OTHER CORPORATIONS FROM ENGAGING IN THE SAME BUSINESS TO THE SAME EXTENT ON EQUAL TERMS?

Prohibition, not regulation, is accomplished by the provisions of the laws under attack which make it a crime for some corporations, like Braeburn, to attempt to become bank holding companies after the effective date of the Act, while leaving existing bank holding companies

free to continue their established operations without regulation. There is no limitation as to the number of banks in which existing bank holding companies may be interested or the extent of such interest, provided that the interest was acquired before the effective date of the Act. Unlike the so-called "grandfather clause" and "non-conforming use" situations, the existing bank holding companies can be expected to continue in perpetuity. This disparity, practically prohibits Braeburn, and other non-bank holding companies, from engaging in the same type of operation on equal terms, and, in effect, prohibits them from engaging in the same business at all. Under the challenged Act, Braeburn is limited to ownership or control of the shares of one bank. Once it obtains 15% or more of the voting shares of such bank, it can acquire no more than 14% of the voting shares of any other bank, subject to the further limitation that it may not, in any manner, control the election of the majority of directors of a second bank. This difference grants economic advantage and tends to create a monopoly.

C

DOES THE ACT, ON ITS FACE, GIVE SUCH AN ECONOMIC ADVANTAGE TO THOSE BANK HOLDING COMPANIES WHICH WERE ENGAGED IN THE BUSINESS ON THE EFFECTIVE DATE OF THE ACT OVER THOSE WHO ATTEMPT TO ENTER THE BUSINESS AFTER THAT DATE AS TO DEPRIVE THE LATTER, INCLUDING BRAEBURN, OF THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY SECTION 1 OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES!

The prohibition contained in the Act represents the point at which the Illinois legislature determined that no corporation could function effectively as a bank holding

company. The principle which may be deduced from the applicable declarations of this Court is that an Act which arbitrarily discriminates against one class in the transaction of a business or a lawful occupation, and leaves unaffected by such discriminatory enactment, other persons or classes of persons engaged in acquiring property in a manner not distinguishable in character from that in which the class discriminated against is engaged, contravenes the Constitutional guaranties under consideration.

By the application of these principles, there can be no actual, substantial difference in corporations created or licensed under the "Business Corporation Act" of Illinois, from the mere fact that the General Assembly gives the right to some such corporations to own and control 15 per centum or more of the voting shares of each of two or more banks or of a company which is a bank holding company, and withholds the same right and privilege from others. Such distinction is purely artificial, is created solely for the purpose of making a class, and hence, offends the equal protection clause of the 14th Amendment.

The economic advantages of bank holding company operation are concisely described in the remarks of Howard C. Sheperd, chairman of the First City Bank of New York before the New York Joint Legislative Committee to Revise the Banking Law, (*The American Banker*, January 17, 1957, p. 13):

> "(Bank holding companies) permit unit banking with autonomus local management, combined with centralized supervision, and co-ordinated investment, economic, audit, operating, foreign and other specialized services of a type and extent which a unit bank cannot provide."

Where the effect of a classification which has no basis in factual difference is to deprive one group, such as Braeburn, of these advantages, it offends the equal protection clause of the Constitution of the United States.

D

DOES THE PRIVILEGE GRANTED BY SECTION 3 (2) OF THE ACT TO ANY BANK HOLDING COMPANY WHO ON THE EFFECTIVE DATE OF THE ACT OWNED OR CONTROLLED A MAJORITY OF THE VOTING SHARES—THE RIGHT TO PURCHASE ADDITIONAL SHARES OF SUCH BANK WITHOUT LIMITATION WHILE BRAEBURN AND OTHERS ARE DENIED THE SAME RIGHT—UNLAWFULLY DISCRIMINATE AGAINST THE LATTER SO AS TO DEPRIVE IT OF THE EQUAL PROTECTION OF THE LAWS?

E

MAY THE STATE OF ILLINOIS DISCRIMINATORILY RESTRICT THE RIGHT OF CORPORATIONS SUCH AS BRAEBURN TO ACQUIRE, OWN, HOLD AND VOTE SHARES OF THE CAPITAL STOCK OF BANKS CREATED BY THE LAWS OF THE UNITED STATES?

The provisions of the "Bank Holding Company Act of 1957" make it a crime for some corporations, after the date of the Act, to acquire, own, and control shares of capital stock of all banks, not only Illinois banks, but also national banks, in excess of the limit prescribed by the Act. Under the decisions of this Court, this legislative attempt to regulate and exercise control over national banks is void.

F

IS THE ILLINOIS LEGISLATION REPUGNANT TO THE FEDERAL BANK HOLDING COMPANY ACT OF 1956, BY THE TERMS OF WHICH, CONGRESS UNDERTOOK TO PRESCRIBE THE TERMS AND CONDITIONS UPON WHICH CORPORATIONS COULD PURCHASE AND HOLD THE SHARES OF MORE THAN ONE NATIONAL BANK?

Even though Sections 3(b), 3(d) and 7 of the Federal Bank Holding Company Act of 1956 purport to delegate certain powers to the States with respect to bank holding companies, do these Sections extend to giving to a State the power to permit certain bank holding companies to exist without regulation and to deny other corporations the right to exist as bank holding companies, in view of the comprehensive and individualized scheme of regulation adopted by Congress?

STATEMENT OF THE CASE.

Braeburn Securities Corporation was organized on February 6, 1956 as an Illinois corporation (R. 3; Abst. 2-3) for the purpose of engaging in the investment business (R. 3; Abst. 13-15). By an amendment to its charter, accepted by the Secretary of State of the State of Illinois on February 23, 1956 (R. 3; Abst. 3), Braeburn's corporate purposes include the power "to purchase or otherwise acquire, own, hold, pledge, deal in and with, exchange, sell and otherwise dispose of shares of capital stock" (R. 3; Abst. 15):

> "• • • including without limitation shares of capital stock of a bank or banks created by the laws of the State of Illinois or by any other state or by the laws of the United States and the shares of the capital stock of corporations which are bank holding companies whether created by the laws of the State of Illinois or by the laws of any other state and as owner of any such shares of stock of corporations of the character hereinbefore described and without limitation to exercise all rights, powers and privileges of individual ownership thereof, including the right to vote said shares of stock as fully and to the same extent as natural persons might or could do" (R. 3; Abst. 16).

On May 9, 1956, the Congress enacted the Federal Bank Holding Company Act of 1956 (12 U.S.C. §1841, *et seq.*) which is in all respects a regulatory Act. With certain exceptions that are not material here, this Act defines a bank holding company as one which owns or controls, with power to vote, either directly or indirectly, 25% or more of the voting stock of two or more banks or of a bank holding company (Sec. 2).

The Federal Act simply prohibits a company from becoming a bank holding company *without the prior approval of the Board of Governors of the Federal Reserve System* (*Sec. 3(a)*). It provides a definite administrative procedure (Sec. 3(b)), including standards (Sec. 3(c)) and the right to judicial review (Sec. 9), by which such approval can be sought in each individual case.

With respect to state power, Section 3(b) of the Act provides that notice of applications to the Board of Governors under it shall be given to the supervising authority of the interested state if the applicant thereunder, or the bank in which an interest is sought to be acquired, is a state bank. In the event the state supervising authority disapproves, the Board is required to set the application for hearing. The Board then has power, upon such hearing, to grant or deny the application. Section 3(d) prohibits the approval of applications by bank holding companies with respect to banks located outside of the state where the holding company maintains its principal office or place of business unless the acquisition of shares or assets of a state bank by a foreign bank holding company is specifically authorized by state statute in the state in which such bank sought to be acquired is located. Section 7 provides that the Act shall not be construed as preventing any state from exercising such jurisdiction as it had at the time of its enactment or might thereafter acquire, over banks, bank holding companies, and their subsidiaries.

Thereafter, the General Assembly of Illinois passed the Illinois "Bank Holding Company Act of 1957".(2)

Section 1 of the Illinois Act declares the public policy of the State as being in favor of protecting the independence of unit banks and of preserving competition in the banking industry.

Section 2 defines the term "bank" as including both national and state banks. It also defined "bank holding company" as being a company which owns or controls, indirectly, 15% of the voting shares of each of two or more banks or of a bank holding company or which controls the election of a majority of directors of each of two or more banks.

Section 3 prohibits any action to be taken, after its effective date, which results in a company becoming a bank holding company. This section also permits existing bank holding companies to acquire additional shares in any bank

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(2) Actually, this is the second attempt of the Illinois legislature to enact legislation on this subject. Section 5 of the 1957 Act repealed the Illinois "Bank Holding Company Act of 1955". The previous Act had been held unconstitutional and the instant Act represented a legislative attempt to cure the defects. As the trial judge commented (R. 3; Abst. 21-2):

"This matter was before me in an earlier action in which the Statutes of 1955 dealing with the same subject matter were attacked. In that case I held that both the Holding Company Act and the Amendatory Act of the Business Corporation Statute were unconstitutional.

"An appeal was taken to the Supreme Court; but before that was reached, the Legislature repealed those two Acts, and the question became moot, and the appeal was dismissed."

Both Acts represented the fruits of the legislative activities of the Illinois Bankers Association (See: 75 **Finance** "Illinois Bank System Placed on Yardstick" p. 33, at p. 36 (July 15, 1958).)

in which it owned or controlled a majority of the voting shares, to retain existing holdings, and to acquire up to an aggregate of 5%, in each instance, of the shares of any other bank.

Section 4 provides for a fine of from $500 to $5,000 for each day upon which a company wilfully violates the Act and for a fine of up to $10,000 and/or imprisonment for not more than one year for any individual who wilfully participates in a violation of it.

Meanwhile, and prior to the date of the Illinois Act of 1957, Braeburn had been engaged in the general investment securities business and, at the time of filing its complaint, proposed and was prepared to purchase the shares of two or more state banks and two or more national banks, in excess of 15% in each case, and to exercise the rights of such ownership, including the right to vote the shares proposed to be purchased (R. 3; Abst. 4). The defendants, as the law enforcement officers charged with the enforcement of the challenged Acts, asserted that the Acts were constitutional and that Braeburn's proposed acquisitions of stock would violate them (R. 3; Abst. 10). At the same time, existing bank holding companies are permitted to continue their operations in Illinois, unrestricted as to their existing holdings and as to

the acquisition of further holdings in banks in which they already held or controlled a majority of the stock.(*)

(*) This cause comes before this Court on the pleadings. Mr. Justice Hershey stated, in the Illinois court's opinion, (R. 11; App. "B", infra, p. 18a):

"An examination of the complaint here fails to disclose any allegation to the effect that bank holding companies, if any were in existence on the effective date of the act, held any such amounts of bank stock that threatened the generally independent structure of the Illinois banks."

It must be assumed, in this Court, that the number of bank holding companies, and the extent of their influence upon the banking business in Illinois, was significant at the time of the Act. This Court has always been free to make an independent examination of the facts when it is necessary to decide whether a fundamental Constitutional right has been infringed, **Craig** v. **Harney**, 331 U.S. 367, 373-4, 91 L. ed. 1546, 1550-1. Such an examination of this case supports the foregoing statement.

(a) The complaint contained repeated allegations as to the existence and effect of bank holding companies, as defined in the Act (Comp. pars. 6(a); 6(b); 6(g); 6(i); R. 3; Abst. 9-10). In subparagraph 6(b), it was specifically alleged that the discrimination favoring existing holding companies attempted to "grant economic advantage to some and tends to create and foster monopolies in the field of banking * * *." The defendants filed a motion to dismiss the complaint which alleged only (1) that the act contravened neither the State nor the Federal Constitution and (2) that "the complaint is otherwise and in other respects unsubstantial and insufficient." This latter allegation was wholly meaningless under Illinois practice (Rule 45 of the Ill. Sup. Ct.; Ill. Rev. Stats. (1957) ch. 110, par. 101.45). Thus, these allegations created a prima facie case (**Williams** v. **Kaiser**, 323 U.S. 470, 474, 89 L. ed. 398, 401).

(b) The presumption of validity which attaches to a state statute rests upon the fact that the legislature believes it has found a necessity for it. Thus, a finding that the evils of existing bank holding companies were effecting the public interest would be a jurisdictional prerequisite to the passage of the instant Acts. **Liggett Co.** v. **Baldridge**, 278 U.S. 104, 73 L. ed. 204.

How the Federal Question Was Presented:

Although it is clear from the opinion by the Supreme Court of Illinois that issues involving the equal protection clause of Section I of the 14th Amendment to the Constitution of the United States and the conflict between the state and federal legislation regarding bank holding companies were decided in that court, the opinion does not correctly state the exact nature of the contentions with respect to the equal protection clause

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(Footnote 4 continued)

(c) This case was actually decided upon such an assumption. Although defendants' motion was insufficient to raise the point, it was mentioned in their reply brief in the trial court; plaintiff thereupon prepared an amendment to set these facts out explicitly, and defendants there specifically waived this contention (R. 3; Abst. 20-1). The trial court assumed the existence of bank holding companies on the effective date of the Act (R. 3; Abst. 23-4). The whole situation, together with the proposed amendment, was called to the attention of the Illinois Supreme Court, in appellant's petition for rehearing, after appellant had discovered for the first time from the opinion that the Court took this view of the facts (R. 16; Ptn. pp. 8-10, fn. 2; pp. 13-17).

(d) Although not included in the record in this case, the actual fact is that there were, as of December 31, 1957, two bank holding companies in Illinois registered under the Federal Bank Holding Company Act of 1956. These companies have five bank affiliates. (Nadler & Bogen, **The Bank Holding Company** (N.Y. Univ., 1959) p. 16.) The Federal Bank Holding Act of 1956, of course, defines a bank holding company as one which owns or controls 25% of the voting stock of each of two or more banks. The definition in the Illinois Act is more stringent, requiring only ownership or control of 15%. Thus the above figure represents a minimum.

and the conflict with the Federal Bank Holding Company Act. (5)

The complaint specifically alleges that the Illinois Bank Holding Company Act of 1957 violated Section I of the 14th Amendment to the Constitution of the United States in that it unlawfully discriminates against corporations such as plaintiff. The exact phraseology of this allegation (R. 3; Abst. 5-6) is as follows:

> "That said 'Illinois Bank Holding Companies Act of 1957' violates Sec. 22 of Art. IV of the Illinois Constitution, in that it grants to some corporations, associations and individuals special and exclusive privileges, immunities and franchises, and also violates Sec. I of the 14th Amendment of the Constitution of the United States, in that it unlawfully discriminates against some corporations, such as plaintiff, and results in a denial of equal protection of the laws guaranteed by the 14th Amendment to those who are subjected to the requirements of the Act. Under the provisions of the Act, all shares of the capital stock of Banks created by the laws of the State of Illinois, or by the law of another State, or by the laws of the United States, owned by corporations on the effective date of the act are exempted from the operation of

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(5) Mr. Justice Hershey explicitly recognizes that defendant raised the Federal Constitutional issue in the trial court (R. 6; App. "B" infra p. 12a). However, in attempting to resummarize plaintiff's contentions, the opinion could be construed, at one point, as giving the impression that the only equal protection issue which was raised arose out of the fact that bank holding companies existing on the date of the Act could purchase additional shares of any bank in which such existing bank holding company owned or controlled a majority of voting shares on the effective date of the Act (R. 8-9). However, as is shown, Federal issues were presented and decided with respect to the method of classification generally.

the Act, regardless of the number of shares owned, and regardless of the number of banks controlled by the voting of such shares; whereas, corporations such as plaintiff, not owning shares on the effective date of the Act, but desiring to purchase such shares subsequent to the date of the Act, are denied the same right and privilege, circumstances and conditions being the same. The 1957 Act is a special law, in that "it creates a statutory class, exempting those owning bank shares on the effective date from its operation. Such statutory discrimination, creating a closed class, violates Sec. 22 of Art. IV of the Illinois Constitution, and the equal protection clause of the 14th Amendment, in that it is an attempt to give an economic advantage to those Bank Holding Companies engaged in business on the effective date of the Act against all those such as plaintiff who enter the business after that date. The Act makes it a crime for a corporation, such as Plaintiff, to acquire shares subsequent to the date of the Act, while allowing other corporations, owning such shares prior to the effective date of the Act, to continue such ownership and to vote the shares without limitation. Circumstances and conditions being the same, such statutory discrimination, as applied to Plaintiff and others, deprives them of the equal protection of the law."

The point with respect to the acquisition of additional shares where a majority was already owned by an existing bank holding company on the effective date of the Act was raised by paragraph 6 (b). The exact allegation in this respect is as follows (R. 3; Abst. 6-7):

"That said 'Illinois Bank Holding Companies Act of 1957' violates Sec. I of the 14th Amendment of the Constitution of the United States in that it unlawfully discriminates against some corporations, such as plaintiff, and results in denial of equal protection of the laws, guaranteed by the 14th Amendment to corporations who are subjected to the requirements of the Act. Under Sec. 3 of the 1957 Act, a bank

holding company (as defined in the Act) who, on the effective date of the Act, owned or controlled the majority of the voting shares of a bank, may acquire by purchase additional shares of such bank without limitation. Thus, a holding company, owning the majority of the shares of a bank, on the effective date of the Act, may thereafter acquire all of the shares of the minority interests; whereas, the minority interests are denied the right of acquiring the majority interest, circumstances and conditions being the same. Such discrimination is an attempt to grant economic advantage to some and tends to create and foster monopolies in the field of banking, contrary to law."

Likewise, the issue with respect to the attempted invasion by the Illinois Act of Federal jurisdiction over the internal affairs by National Banks was raised in sub-paragraph 6 (e) (R. 3; Abst. 8):

"That the 'Bank Holding Companies Act of 1957' is invalid, in that it attempts to limit control and restrict the right of corporations such as Plaintiff, created by the laws of the State of Illinois, to own, hold and vote shares of the capital stock of banks created by the laws of the United States. Such National Banks, as a matter of law, are under the exclusive jurisdiction and control of the Federal Government, and any State Law which undertakes to limit or control such banks is void."

Tendering only the general issues of constitutionality, the defendant's motion was only sufficient to place all of these contentions in issue (R. 3; Abst. 16). The trial judge, in turn, passed upon each contention as follows:

"The Federal Act is a regulatory measure, and like so many other things that the Federal Congress can do under the grant of power by the Constitution, it can create an agency to control or supervise certain activities, and that is precisely what the Federal Act does. It doesn't prohibit. It simply prohibits the cre-

ation without the consent of the agency empowered to control it, like the Commerce Commission or the Securities Commission; and certainly, under the Federal Constitution, there can be no objection to that.

"It may be that no objection can be urged against such a measure under our Constitution, although it would be much more difficult to sustain such an Act in the absence of a showing that the police power of a state demands it; but assuming it can be sustained under the Act that is under our Constitution, can we sustain an Act which entirely prohibits, especially when the prohibition applies only to those persons who seek to establish that business and does not affect the existing enterprises carrying on that particular business?

"You, (addressing appellees' counsel) in your brief, stressed the fact that there was no requirement that existing businesses divest themselves of its surplus stock. Under certain circumstances, of course, under the so-called grandfather clause, certain things may be for a time continued in operation, but that is not the situation here.

"Moreover, it offends the very purpose declared by the Statute. Its purpose is supposed to be to insure competition, but this does just the opposite. It doesn't allow competitors to have equal rights. It prohibits it.

"It simply creates a monopolistic franchise in favor of those establishments of a legal business which had the good fortune of coming into existence prior to the Act.

"It occurs to me that the Legislature has no right to prohibit any legal business, either to all the people or any of the people of the State, unless the business in itself is such that under the police power the State can prohibit, but even such as it can prohibit, it can't allow one portion of the citizenship to continue in the business and prohibit it to all the others" (R. 3; Abst. 23-24; App. "A", *infra*, p. 3a-4a).

• • •

> "I am going to hold the Act unconstitutional and since the Bank Holding Company act falls, then the 1957 amendment of 5 (g) of the Business Corporation Act, as amended, must also fall. It depends, by its own terms, for its operation on the Bank Holding Company Act of 1957" (R. 3; Abst. 31; App. "A", *infra*, p. 10a).

In addition, the trial court specifically found in its declaratory judgment order that both of the challenged Acts violated Section I of the 14th Amendment to the Constitution of the United States (R. 3; Abst. 18-19) and entered judgment on that basis (R. 3; Abst. 20).

In his opinion, Mr. Justice Hershey recognizes that the trial court held, as contended by Braeburn, that the "Bank Holding Company Act of 1957" contravenes Section I of the 14th Amendment to the Constitution of the United States (R. 6) in that bank holding companies existing as of the effective date of the Act are allowed to continue thereafter their existing ownership of bank stock. He then attempts to show, and states, that the alleged differences between bank holding companies and non bank holding companies on the effective date of the Act was proper classification (R. 8). He likewise recognizes that the issue to be decided is the basis for the classification (R. 9). Mr. Justice Hershey clearly indicates that the Supreme Court considered the fundamental issue as to the classification contained in the Illinois Bank Holding Company Act of 1957, in light of the equal protection clause of the Federal Constitution, when he says (R. 10, App. "B", *infra*, p. 17a):

> "The legislature has not decreed that there be divestiture of existing holdings of companies classified as bank holding companies, but rather that the concentration as it now exists has gone far enough.

"We find nothing arbitrary in the exemption of existing bank holding companies, for, as we have indicated, the evil we sought to be remedied is the further concentration of control, and this is reached, reasonably, by the institution of the prohibition against further acquisition. Neither the fourteenth amendment nor the Illinois constitution forbids statutes and statutory changes to have a beginning, nor does either prohibit reasonable discrimination between rights as of an earlier time and rights as they may be determined at a later time. (*Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502, 55 L. ed. 561). Certainly the legislature has a right to make a distinction in its enactments between existing rights and conditions and rights and conditions that may exist in the future. This legislative prerogative is abundantly clear in the decisions relating to zoning cases and existing nonconforming uses.

His only Federal citation, the *Sperry & Hutchinson* case, is not analogous, factually, does not involve the constitutional provision invoked in this case, and only passes upon the question of distinctions based upon the effective date of the act in a superficial dictum. He fails to recognize the fact that the "non-conforming use" and "grandfather clause" cases represent a method of gradually abolishing existing evils, employed because of contravailing equities, and not a legislative warrant to continue them in perpetuity. (These statements are supported in our discussion of the substantial nature of the questions presented, *infra*, p. 25-9).

As a result, Mr. Justice Hershey improperly concludes:

"The classifications provided in this act are thus clearly based upon a reasonable basis, and constitute no special legislation, *deny no equal protection of the laws*, and grant no privilege or immunity in effecting

such classification, in violation of constitutional provisions" (emphasis supplied) (App. "B", *infra*, p. 18a).

With respect to the conflict with the Federal Bank Holding Company Act of 1956, the Supreme Court of Illinois said (R. 9-10; App. "B", *infra*, p. 16a):

> "In 1956 Congress adopted legislation regulating bank holding companies (12 U. S. C., pars. 1841 *et seq.*) and provided, among other things, that its action should not impair the then jurisdiction of the States, and further specifically provided that administration of the Federal Act should be within the confines of State law if any. The Illinois legislation, as well as legislation in New York, New Jersey, Pennsylvania and Indiana, is an acceptance of the suggestion implied in the Federal act that the States should act if, as a matter of policy, bank holding company legislation more restrictive than the Federal act was desired by the States. Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field * * *."

The Federal questions raised on this appeal, as stated here by Braeburn, are abundantly clear in the record and warrant this court's jurisdiction. In *Consolidated Coal Co.* v. *Illinois*, 185 U.S. 203-206, 46 L. ed. 872, 875, the denial of a motion in arrest of judgment on the grounds that the state statute under attack was repugnant to the equal protection clause of the 14th Amendment presented federal questions for this Court even though the state reviewing Court did not pass on them in explicit terms.

THE QUESTIONS ARE SUBSTANTIAL.

Whenever a state legislature passes economic legislation that makes existence prior to its passage the sole criterion for determining who can engage in a business which is not unlawful *per se*, a substantial question arises under the equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States. Moreover, this decision by the Supreme Court of Illinois demonstrates that court's inability to adopt this Court's interpretation of this Constitutional provision, as laid down in *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d 1485. In addition, as applied to the right to become a bank holding company by acquiring interests in national banks, the challenged legislation conflicts with and defeats the policy adopted by Congress. This case does not involve the rights of Braeburn alone, but presents the question whether existing special interests may block attempts to provide necessary improvements in the method of conducting the banking business.

1. No corporation can become a bank holding company in Illinois after the Acts' effective date. Those companies who are already engaged in the business may continue therein throughout their corporate life which may be, and usually is, perpetual. The Illinois court attempts to justify this distinction by reference to the "grandfather clause" and "non-conforming use" cases (R. 10; App. "B", *infra*, p. 17a). Both of these lines of authority rest upon a rationale that improvement in standards should be accomplished gradually by permitting those practitioners and uses which do not conform to the

new standards to exhaust their existence without being required to conform to the new standards. In the instant case, the distinction between existing bank holding companies, and others, will not result in the gradual disappearance of bank holding companies in Illinois. *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266, 274, 80 L. ed. 675, 679, recognized the inapplicability of these authorities to prohibitions of the type under attack here.

There, this Court, rejecting the "grandfather clause" and "non-conforming use" cases, held that a statute which granted a differential in the regulated price at which dealers who were in business before April 10, 1953 could sell milk violated the equal protection clause. The rationale of that decision—that the challenged act was an attempt to give economic advantage to those in the business as of an arbitrary date rather than a measure adopted for the protection of the public interest—is equally applicable here. In sustaining the instant Acts, the Supreme Court of Illinois misapplies the canon of constitutional construction that a court may not look to the wisdom of the act involved by using it to avoid consideration of whether any evils or abuses are involved in bank holding companies *per se*, (R. 2-8; App. "B", *infra*, p. 15a). Thus, it falls into the error in the application of the equal protection clause which this Court avoided in the *Mayflower Farms* case.

It has never been a principle of Federal constitutional law that a state's police power may be invoked to protect existing business at the expense of others who seek to enter the field. The purchase of securities for investment is a business and plaintiff's right to invest its capital and to conduct a general securities business cannot be denied, *Lewis* v. *West Side Trust and Savings Bank*, 376

Ill. 23, 32 N.E. 2d 907; *Liggett Co.* v. *Baldridge*, 278 U.S. 104, 73 L. ed. 204; *Adams* v. *Tanner*, 244 U.S. 590, 61 L. ed. 1326. The *Liggett* case also recognizes that corporations are citizens and entitled to protection against contraventions of the equal protection clause of the Constitution by state legislatures. In this field, this Court has held that the power to regulate does not mean the power to destroy by discrimination, equal protection of the laws meaning equal exemption with all others of the same class from charges and burdens of every kind, *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79, 46 L. ed. 92.

On its face, the Act cannot be sustained as a regulatory measure since it does not regulate. It merely prohibits some from engaging in business as bank holding companies while leaving existing companies free to continue their operations, unfettered. More than that, it permits them to increase the degree of control over certain of their affiliates—those in which they already control a majority of the stock. This type of class legislation has been repeatedly condemned by this Court, *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d 1485, 1492-3; *Mayflower Farms Inc.* v. *Ten Eyck*, 297 U.S. 266, 274, 80 L. ed. 675, 679; *Hartford* v. *Harrison*, 301 U.S. 459, 463, 81 L. ed. 1223, 1226; *Smith* v. *Cahoon*, 283 U.S. 553, 75 L. ed. 1264; *Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37-8, 72 L. ed. 770, 773-4.

Unable to distinguish these authorities, the Supreme Court of Illinois ignores them completely, relying upon the decision of this Court in *Sperry & Hutchinson* v. *Rhodes*, 220 U.S. 502, 55 L. ed. 561 to sustain its position (R. 10; App. "B", *infra*, p. 17a). In that case, a photographer had sold Mrs. Rhodes some photographs. After completing the transaction, he entered into an agreement for the sale

of other photographs to Sperry & Hutchinson, in connection with which he furnished and they used the photograph of Mrs. Rhodes to illustrate the type of photograph which they would supply in exchange for trading stamps. Mrs. Rhodes brought an action for damages, based upon a New York statute which made it a misdemeanor to use the photograph of any living person in such manner and which created a right of action for the person whose photograph was so used. The photograph of Mrs. Rhodes was taken after the passage of the Act. The Court of Appeals held that the statute applied to photographs taken after its passage so that the property right in the photographer alleged to have been confiscated only came into existence after the passage of the act and was qualified by it. The challenge to the act, as appears from the opinion, was predicated upon a violation of the due process clause, not the more stringent equal protection clause.

What the Illinois court apparently relied upon was the dictum concerning a comment made in the argument that the distinction between photographs taken before and after the passage of the statute was repugnant to the 14th Amendment. This is not analogous to the case at bar which is a business classification case. *Sperry & Hutchinson* presented no question of a legislative classification, resulting in a closed class and conferring economic business advantages upon the members of that class which were denied to others who were not members of the class.

Since its decision, *Sperry & Hutchinson* has been cited with approval by this Court only once, and in that case (*Williams* v. *Walsh*, 222 U.S. 415, 420, 56 L. ed. 253) for a proposition wholly irrelevant to the jurisdictional facts of this case. Moreover, in the factually analogous cases

of *Liggett Co.* v. *Baldridge*, 278 U.S. 104, 73 L. ed. 204 and *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266, 80 L. ed. 675, this Court expressly refused to apply *Sperry & Hutchinson.*

2. The confusion in the Supreme Court of Illinois as to the scope of the equal protection clause of the Federal Constitution is not new to this Court. In *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d 1485, which arose from a holding of the United States District Court that invalidated the Illinois Community Currency Exchanges Act, this Court was confronted with a decision by the Illinois Supreme Court in *McDougall* v. *Leuder*, 389 Ill. 141, 58 N.E. 2d 899, sustaining the same Act. In both instances, one ground of challenge to the Act arose from the exemption of businesses engaged in the sale or issuance of U.S. Postal, American Express, Postal Telegraph Company or Western Union money orders only from its licensing and regulatory requirements. The plaintiffs in *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d 1485, were a firm not exempted from the operation of the act and engaged in issuing money orders and their druggist agent who actually sold the money orders. This Court held that the exemption of one money order issuer, American Express Company, from the statutory class invalidated the Act because of the remote relationship of the classification to the purpose of the Act and the creation of a closed class.

The fallacy in *McDougall* v. *Lueder*, 389 Ill. 141, 150-1, 58 N.E. 2d 899, 904 arose from the fact that it misinterpreted *Wedesweiler* v. *Brundage*, 297 Ill. 228, 130 N.E. 520 as involving a grant of special privilege, forbidden by Section 22 of Article IV of the Illinois Constitution of 1870, not a question of equal protection under Section 1 of the 14th Amendment to the Constitution of the United

States. In addition, in distinguishing the *McDougall* case on the grounds of direct competition, it ignored the criterion applied by this Court in *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d 1485, 1495. Finally, the court there erred in assuming that the responsibility of the exempted companies bore a reasonable relation to the purpose of the Act, dealing with "purely local problems." This criterion, as the sole test, was rejected by this Court in *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d 1485, 1493, in favor of a test which prohibits the creation of business hazards for those not members of a favored class through statutory discrimination.

The misconception as to the equal protection clause is further apparent in the instant decision. As has been shown in our discussion of *Sperry & Hutchinson* as applied to the instant case, the Illinois Supreme Court failed to distinguish between the tests appropriate to a due process question and those to be applied to an equal protection question, (compare: *Truax* v. *Corrigan*, 257 U.S. 312, 331-4, 66 L. ed. 254 with *Detroit Bank* v. *United States*, 317 U.S. 329, 337-8, 87 L. ed. 1774). Nowhere in the Illinois court's opinion are the intrinsic evils, if any, of bank holding companies explored. To avoid this, the opinion accepts an implied legislative determination thereof as conclusive and characterizes the problem as one of merely determining limits of permissible legislation, without reference to the problem involved. (R. 10).

The reason why Justice Hershey adopts this approach is that he assumes, *a priori*, that "branch banking" and "bank holding companies" are synonymous, and relies upon the Illinois prohibition of branch banking (R. 9; App. "B", *infra*, p. 16a). The purpose of this Act is to protect local autonomy, *i.e.*, the independence of unit

banks, and one of the principal differences between "branch banking" and holding company operation, is the greater degree of autonomy which the local management has under the latter method (*The American Banker*, Jan. 17, 1957, p. 13). Thus, the policy as to "branch banking" is not, *per se*, applicable. Therefore, a decision relying upon that policy, without examining the factual differences in the operation of the two types of group banking, is predicated upon an unsound premise.

Since the avowed purpose of the Act (Section 1) is to protect the independence of unit banks and preserve competition, it must follow that the Act was engendered by some danger to the public which the legislature professed to find in existing bank holding company operations. But the Act expressly exempts existing bank holding companies. Thus, it fails in purpose. The provisions of the Illinois Act prohibiting new bank holding companies make it clear that the statute was intended to afford the public continuing protection against the alleged evils of such bank holding companies, but, notwithstanding the evils of existing bank holding companies, they are allowed to continue unregulated, although both new and existing companies are identical in organization, capital, powers and privileges. It follows that such classification is not based on anything having relation to the purpose of the Act. As a result of the failure to recognize this, Justice Hershey confuses the issue of reasonableness of legislative action in the due process sense with that of unlawful discrimination.

Left uncorrected, the *McDougall* opinion and the opinion of Mr. Justice Hershey form a basis upon which a body of decisions could evolve in Illinois which would entirely destroy the doctrines laid down by this Court

in the *Morey* case, as the rule to be followed in determining the validity of legislative acts which create a closed class.

3. Mr. Justice Hershey disposes of the proposition that the acts here in question invade or conflict with the Federal Bank Holding Company Act by reference to the powers reserved to the States in Sections 3(d) and 7 thereof, (12 U.S.C. §§1842 (d) and 1846), (R. 9-10). Section 7 of the Federal Act provides that the state may exercise such powers and jurisdiction as it had at the time of the enactment with respect to banks, bank holding companies and their subsidiaries. This does not subordinate the Federal Act to the State Acts, as Mr. Justice Hershey contends.

Ever since *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579, jurisdiction over internal affairs of national banks was exclusively in the Federal government, and any State law which undertook to limit or control such banks is void. The power to determine who may be stockholders of national banks is, therefore, exclusively vested in the Congress of the United States, and the Congress has never seen fit to relinquish such control, nor could it, under constitutional limitations, transfer this legislative power or delegate such control, even if it desired to, as such power is not delegable (*Knickerbocker* v. *Stewart*, 253 U.S. 140, 64 L. ed. 834; *Osborne* v. *Bank of United States*, 9 Wheat., 738, 867, 6 L. ed. 204, 235; *Farmers & Merchants National Bank* v. *Deering*, 91 U.S. 29, 23 L. ed. 196, 199).

Mr. Justice Hershey entirely omits a consideration of the provisions of Sec. 3(b) of the Act, whereby, although supervising authorities of a State are permitted to be heard in opposition to applications to become a bank hold-

ing company, such opposition is not binding and determinative upon the Federal agency to whom the legislative power of Congress is there delegated.

As a matter of fact, in only one instance does the Federal Bank Holding Company Act of 1956 expressly give States a right of absolute veto and that right is limited to the situation where a foreign holding company seeks to acquire an interest in banks located in states other than that in which it has its principal office or place of business (Sec. 3(d): 12 U. S. C., §1842(d)). By expressly conferring a veto power, in one instance, Congress, under the well recognized maxim of statutory construction, clearly intended to deny that power in all other instances with respect to national banks.

The Federal Bank Holding Company Act of 1956 represents the first recognition of bank holding companies as a respectable division of the banking business, by adopting regulatory, rather than prohibitory, measures with respect to them. (See: Tyng, "Will State Banks Adjust To Growing Pressures?" *Burroughs Clearing House for Bank and Financial Officers,* May, 1957, p. 45). In effect, the Acts under challenge here are in diametric conflict with this new approach, since they absolutely prohibit the very action which Congress has deemed to be desirable under regulation, the formation of new, additional bank holding companies.

Thus, as applied to national banks, the banking business is confronted with the anomaly of a state prohibitory statute preventing the operation of a Federal regulatory act. The resolution of which policy should prevail is a question of substantial importance to the entire financial system of this country.

4. This case does not involve merely the future of Braeburn Securities Corporation. Beyond individual unit banks, two major, different plans have evolved for integration, in order to minimize the effect on investors of local fluctuations and to secure the availability of larger supplies of capital and more efficient operation.(*) These are branch banking and group banking. The distinction between them is that branch banking involves control of two or more banking offices by a single legal entity; whereas, group banking involves separately incorporated banks brought under common control, exercised by a holding company. (Chandler, *Economics of Money and Banking* (rev. ed., 1953) p. 339). The principal functional distinction lies in the fact that in group banking, through a holding company, the management remains local because of the separate legal entities.

Bankers have recognized a need for a development of multi-office banking to improve the efficiency of banking service to the public (*American Banker*, May 22, 1957; *American Banker*, April 29, 1957; *American Banker*, January 17, 1957, p. 13). In Illinois, the need for additional banking facilities is unusually strong. Yet the Illinois Bankers Association has manifested a marked indifference to this problem, and, in fact, has opposed both branch banking and group banking. The instant legislation represents the latest in their efforts in this direction. ("Illinois Banking System Placed On the Yardstick", 75 *Finance*, July 15, 1958, p. 33, *et seq.*)

(*)See: Nadler & Bogen, **The Bank Holding Company** (N.Y. Univ., 1959) p. 11.

In fact, the President of the Illinois Bankers Association for 1957-8 is quoted at p. 36 of the article previously cited as reporting to the 1958 Convention of the Association with respect to the instant case, in which the Association appeared *amicus curiae* below in violent support of the Illinois legislation:

> "Personally, I believe this is the most serious problem facing us today, and I want to be quite sure that our entire membership is fully cognizant of this situation. Your executive committee has held several conferences with our attorneys, and we have instructed them to make every possible effort to secure a favorable decision. We are confident that this is being done, but we will welcome any suggestions you wish to make regarding a further course of action, because this case poses a major threat to the maintenance of the independent unit banking system in our State."

With the future of group banking being subjected to delaying tactics, such as the instant legislation, the fundamental question as to the reasonableness, particularly in the face of a determination by Congress that regulated group banking is desirable, of legislation directly attempting to abolish group banking will never be litigated, since, if the pattern of the Illinois Act is sustained, a device will have been found by which to throttle the development of this method of operation before it has become sufficiently important in the banking business to have any substantial effect on it.

Recognizing the need for further developments in banking techniques, the decision in this case presents the availability of group banking as an answer squarely to this Court.

CONCLUSION.

For the above and foregoing reasons, this Court should accept jurisdiction of the foregoing cause and proceed to a full hearing on the merits thereof.

Respectfully submitted,

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APPENDICES

TO

JURISDICTIONAL STATEMENT.

APPENDIX "A".

Opinion of the Honorable Harry M. Fisher, Judge Presiding, Circuit Court of Cook County, in Braeburn Securities Corporation v. Elbert S. Smith, et al., Docket 57C12149.

I want you to know I am entirely in accord with the purpose of the Act in question, but whether I am or not doesn't really make any difference.

The Courts have no right to, and I don't question the policy of the Legislature or its motives in the enactment of a piece of legislation. That is entirely for the Legislature.

The Court is only concerned with the question of the validity of an Act where constitutional questions are involved.

This matter was before me in an earlier action in which the Statutes of 1955 dealing with the same subject matter were attacked. In that case I held that both the Holding Company Act and the Amendatory Act of the Business Corporation Statute were unconstitutional.

An appeal was taken to the Supreme Court; but before that was reached, the Legislature repealed those two Acts, and the question became moot, and the appeal was dismissed.

In 1957 the present Act was enacted. It is possible that the repeal of the 1955 Act and the enactment of the 1957 Act was the result of a recognition on the part of the Legislature that the 1955 Act was defective.

(Appendix)

Therefore, what is presented to me today is the question as to whether the 1957 Act cured those defects.

I have already given my reasons for holding the 1955 Act or Acts unconstitutional; and I shall not repeat those now, but I am frank to say that I don't see much difference between the 1957 Acts and the 1955 Acts, so far as the grounds upon which I held the former Acts unconstitutional are concerned.

Those defects simply continued to be carried over in the new Act and perhaps more specifically.

For instance, the 1957 Act contains directly and expressly the provision that no bank holding company can hereafter be created. I inferred that from the 1955 Act, but here the 1957 Act explicitly states on that question:

> "It shall be unlawful for any action to be taken hereafter which results in a company becoming a bank holding company as defined by this Act."

What is really before me, so far as the briefs of the defendant are concerned, is an appeal that I review my former judgment and reverse msyelf; and the reason urged for it is that since the case was before me, the former case was before me the Federal Congress enacted a bank holding law. Of course, we must take into consideration that what may be proper for the Congress to enact may, in view of special provisions in the State Constitution, be prohibited to the State Legislature.

I won't go into a lengthy discussion of the difference between the Federal Constitution and the State Constitution. There is no prohibition under the Federal Constitution against the vesting of certain powers in bodies specially created by the Congress, which, under our Con-

stitution, would be prohibited as either an invasion of the judicial powers or legislative powers; but so far as the question before me is concerned, the constitutional prohibitions are identical, but the Acts are not identical.

The Federal Act is a regulatory measure, and like so many other things, that the Federal Congress can do under the grant of power by the Constitution, it can create an agency to control or supervise certain activities, and that is precisely what the Federal Act does. It doesn't prohibit. It simply prohibits the creation without the consent of the agency empowered to control it, like the Commerce Commission or the Securities Commission; and certainly, under the Federal Constitution, there can be no objection to that.

It may be that no objection can be urged against such a measure under our Constitution, although it would be much more difficult to sustain such an Act in the absence of a showing that the police power of a state demands it; but assuming it can be sustained under the Act that is under our Constitution, can we sustain an Act which entirely prohibits, especially when the prohibition applies only to those persons who seek to establish that business and does not affect the existing enterprises carrying on that particular business?

You, in your brief, stressed the fact that there was no requirement that existing businesses divest themselves of its surplus stock. Under certain circumstances, of course, under the so-called grandfather clause, certain things may be for a time continued in operation, but that is not the situation here.

Moreover, it offends the very purpose declared by the Statute. Its purpose is supposed to be to insure compe-

tition, but this does just the opposite. It doesn't allow competitors to have equal rights. It prohibits it.

It simply creates a monopolistic franchise in favor of those establishments of a legal business which had the good fortune of coming into existence prior to the Act.

It occurs to me that the Legislature has no right to prohibit any legal business, either to all the people or any of the people of the State, unless the business in itself is such that under the police power the State can prohibit, but even such as it can prohibit, it can't allow one portion of the citizenship to continue in the business and prohibit it to all the others.

There is still another reason. Certain portions of the new Act are, to me unintelligible. That does not mean that it is unintelligible.

Mr. Schwartz: For example, which portions?

The Court: It is urged that the new Act does regulate existing bank holding companies.

Mr. Schwartz: That is correct, it does.

The Court: And now, what does this mean?

Mr. Schwartz: About the five per cent?

The Court: Yes.

Mr. Schwartz: It means exactly this: Supposing on the effective date of the Act, your Honor, a company owns, for example, twenty per cent of the voting stock of two or more banks. After July of 1957 it cannot acquire more than five per cent.

The Court: Additional.

Mr. Schwartz: Additional.

The Court: Does it state that?

Mr. Schwartz: Yes, sir.

The Court: Read it.

"If, after such acquisition, such company will directly or indirectly own or control more than five per cent of the voting shares of such bank * * *"

Mr. Schwartz: Exactly. Bear in mind, your Honor, the effective date of the Act that if they own fifteen per cent or more of the voting stock, they are a bank holding company. The Act says now for any bank holding company—in other words, they are in existence already—that they have lawful existence; that hereafter to acquire more than five per cent would be unlawful, and therefore, they are being regulated.

The Court: No, not acquiring more than five per cent.

Mr. Schwartz: "* * * Own or control more than five per cent."

The Court: "For any bank holding company hereafter to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than five per cent."

Mr. Schwartz: Of such bank, that means.

Mr. Bussian: It could mean five per cent of any other bank.

Mr. Schwartz: It says, "of such bank," I know; but we have to give it reasonable construction, your Honor. For example;

"* * * except that a bank holding company may acquire additional shares in a bank in which such bank holding company owned or controlled a majority."

In other words, if they owned fifty-one per cent of the stock—

The Court: Wait a minute. Where does it say that?

Mr. Bussian: He is reading something else now.

Mr. Schwartz: I am reading Paragraph 2 of Section 3, and we just can't take it out of context.

(Appendix)

The Court: That part you just read with the word "additional," that would apply only to where they already control the majority.

Mr. Schwartz: Exactly.

The Court: And you are quite right that there it doesn't make any difference.

Mr. Schwartz: That is right.

The Court: But they use the word "additional" here, where they do not use it in the first part.

Mr. Schwartz: I grant, your Honor, the word "additional" is not there; but under the cases the Court is aware of, the Court can even add a word, if necessary, in order to give it reasonable construction, because to give it any other construction we would reach an absurd result here, and that is not intended.

The Court: There are so many absurd things in this Act, that I don't want to add any more absurdity.

This is an aside, but I was going to mention something else that strikes me as being rather vital in the determination of the validity of this Act.

Your title is dreadfully misleading. No one reading this title would suspect that partnerships or trustees or joint adventurers were intended to be covered by this Act.

Obviously, whoever reads this, especially in the light of the provision which may be called the Bank Holding Company Act, would conclude that that attempts to regulate companies and corporations; but mind you, no new entity is created by this Act.

Mr. Schwartz: That is correct. In that sense no new entity is created.

The Court: So the word "company" would be, by the average person, regarded as applying to organized corporations.

(Appendix)

It is true, as you say, that as far as organized corporations are concerned, the Legislature can, at its will, modify or change or amend their charter powers, but the Legislator reading this title would imagine that that was what he was doing, affecting the franchise; but it has been repeatedly held that the title must be sufficiently descriptive so as to enable the Legislator to understand what he is voting on, even if he didn't read the entire Act.

You will find it really was the basic reason which prompted the enactment as part of the Constitution, of that specific provision. If you read some of the early cases, you will see.

Mr. Schwartz: The presumption being they never read the full Bill.

The Court: Or whatever the presumption was.

This is misleading, and particularly because without creating such a thing as holding companies, the title indicates that there would be a definition of what holding companies are and then so defines holding companies, that to become a holding company at all would be a violation of law. It isn't a holding company until it violates the law.

Mr. Schwartz: It can be a holding company if, on the effective date of the Act, it does own fifteen per cent or more of the stock.

The Court: If you were a Legislator and you just read the title, would you, in the remotest way, approach any such a meaning; that what it really does is to create something which can't exist?

Mr. Schwartz: In Section 2, in A, B and C—

The Court: Which specifically provides that these are not holding companies.

Mr. Schwartz: That is correct.

(Appendix)

The Court: So what is a holding company. How is it defined?

Mr. Schwartz: You have to go to the definitions in almost any case, your Honor.

The Court: When the definition is such that it can't exist at all, when is it a violation to become a holding company?

Mr. Schwartz: To become a new holding company is a violation.

The Court: That is what it says "to become a new holding company". Why didn't the Legislature just prohibit the ownership of more than fifteen per cent of the stock?

Mr. Schwartz: Why the Legislature didn't do that, your Honor, I can't answer you; but I do say this to the Court; that the title of the Act is adequate, because it is sufficient to apprise any member of the Legislature that here is some legislation which is going to affect the holding of bank stock.

According to your Honor's interpretation of the title, it would be almost necessary to combine the entire Act in the title itself in order for one to determine exactly what this Bill provides.

The Court: No. If the Legislature by its title said: "This is an Act relating to and restricting the holding of stock of more than one bank," I think it would be sufficient to cover this.

Mr. Schwartz: As a matter of fact, although, of course, I did not appear before your Honor in the other—

The Court: In 1955 it was an Act relating to—Bank holding companies and providing a penalty for violation.

The Court: There were no holding companies then except when they violated the Act. You have the same situation here. Beyond that, an individual can hold stock, more

than fifteen per cent, and he is in no way even regulated.

I am not so sure but that an individual can hold such stock in trust even. You would have to stretch your imagination to say that that is prohibited, but that doesn't enter into my determination.

If an individual can carry on a certain business, why can't a partnership? As I indicated, a corporation might be limited, but why a partnership? What right has the Legislature to absolutely prohibit the carrying on of a business which is admittedly permissible and which any individual can carry on?

By what right can a partnership be prohibited?

By what right can a simple joint venture by individuals be prohibited?

You might say that is beside the question in this case, because here it is a corporation; but how can I tell whether the Legislature, without these provisions, assumed they had no power to restrict the enterprise, so far as partners and joint adventurers are concerned?

Mr. Schwartz: Except in this particular instance, the plaintiff has no cause of complaint, the plaintiff being a corporation and not affected by the other provisions of the Act, only as it would apply to corporations in this instance.

The Court: Well, they would have a right to attack it because of this. It all raises a policy question, public policy question as to whether this can be done under the police power.

If the Legislature meant to aid competition, but restricts only corporations, and the corporations complained and said: "You have not carried on the purpose of the Act: you are not restricting—you are only restricting corporations, you are not restricting individuals; you are

not restricting partnerships; you are not restricting joint adventurers," then I think it must be admitted that where the individual is permitted to carry on a business, the Legislature can't take that right away from partners or joint adventurers.

They are only individuals, as far as the law is concerned.

I am going to hold the Act unconstitutional and since the Bank Holding Company Act falls, then the 1957 amendment of 5 (g) of the Business Corporation Act, as amended, must also fall. It depends, by its own terms, for its operation on the Bank Holding Company Act of 1957.

APPENDIX "B".

Opinion of the Supreme Court of Illinois in Braeburn Securities Company v. Elbert S. Smith, et al., Docket 34811.

Mr. Justice Hershey delivered the opinion of the Court:

The 70th General Assembly enacted the Bank Holding Company Act of 1957, and the same was approved on July 5, 1957. At the same time the legislature passed, and the Governor approved an amendment to the Business Corporation Act limiting the general powers of corporations organized thereunder in respect to the ownership and control of stock in banks. The amendment to the Business Corporation Act was simply a means of making that act reflect the limitations and restrictions found in the Bank Holding Company Act of 1957.

Plaintiff, a corporation organized under the Business Corporation Act, by its articles of incorporation and amendments thereto, filed in February of 1956, had as one of its corporate powers and purposes a general investment securities business and specifically the power to purchase, without limitation, the capital stock of banks and bank holding companies, as well as the shares of capital stock of any nonbanking corporation.

The 1957 legislation did limit the nature and extent of the plaintiff's corporate activity by the exercise of control over its acquisition of bank stock and the plaintiff sought relief from these limitations in the circuit court of Cook County in a declaratory judgment proceeding to have the 1957 enactments declared unconstitutional and

void. The Auditor of Public Accounts, the Attorney General and the State's Attorney of Cook County were named as defendants.

The defendants filed a motion to dismiss the complaint on the grounds that the legislation was in all respects constitutional. The circuit court overruled the motion and found the acts to be invalid in that said laws violate sections 13 and 22 of article IV, sections 2 and 14 of article II, and section 1 of article XI of the constitution of the State of Illinois, and also violate section 1 of the fourteenth amendment of the constitution of the United States.

Since the constitutionality of the legislation is involved, this court has jurisdiction of the matter on appeal filed by the defendants from the ruling of the circuit court.

The Bank Holding Company Act of 1957 (Ill. Rev. Stat. 1957, chap. 16½, pars. 71 *et seq.*) has as its declared purpose, as found in section 1 thereof, the protection of the independence of unit banks and the maintenance of competition in the banking system. A bank is defined so as to include both State and national banks, and a bank holding company is defined as any corporation, business, trust, partnership, joint venture, or similar organization (1) which directly or indirectly owns or controls 15 per centum or more of the voting shares of each of two or more banks or of a company which is a bank holding company by virtue of this act, (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 15 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees. Certain exceptions are enumerated in the foregoing, but the same are not material to the issues herein presented.

(Appendix)

The act follows with a prohibition of any action which results in a company becoming a bank holding company as thus defined. Any company in existence at the time of the effective date of the act which is a bank holding company by reason of the definition contained in the act is prohibited from further bank stock acquisition, if after such acquisition such company will own or control more than five per cent of the voting shares of such bank. An exception to this limitation as to existing companies permits such company that already has, by ownership or control, a majority interest in a bank to further acquire shares in such bank without limit.

The act then proceeds to provide the penalties for violation and repeals a 1955 enactment on the same subject.

The brief summary of the 1957 act as above set forth clearly manifests a legislative determination that future ownership and control of banks in Illinois by bank holding companies should be stopped, and that bank holding companies existing as of the date of the enactment should not extend ownership and control beyond the then existing holdings. The act thus seeks to accomplish the purpose announced by the legislature of preserving bank competition and the independence of unit banks by prohibiting corporate ownership of more than 15 per cent of the voting stock in two or more banks.

In our consideration of the questions here submitted we are not, nor can we be, concerned with the wisdom of the legislative action nor the desirability of the purpose as announced by the legislature. Our sole concern is to determine whether the legislature in adopting the policy has acted within its constitutional limitations. *Stewart* v. *Brady*, 300 Ill. 425.

The effect of this legislation is to divide corporations into two classes, first, those which did not on the effective date of the act own 15 per cent or more of the stock in two or more banks and are prohibited then to acquire more than 15 per cent of the stock in any two banks, but may acquire all or a majority of the stock of any one bank and up to 15 per cent of any number of banks, and secondly, those which are defined by the act as bank holding companies. These are prohibited from further acquisitions in banks in which they hold 15 per cent or more of the stock. As to any bank in which such company owns less than 5 per cent of the stock, it may acquire additional holdings not to exceed 5 per cent of the stock of such bank. A corporation in this classification is permitted unlimited acquisition of bank stock if on the date of the act it held a majority or more of the stock of any such bank. Clearly, such acquisition would not make any practical difference in control.

The lower court held that the above classification contained in the 1957 enactment was in violation of section 22 of article IV of the Illinois constitution prohibiting the legislative grant of an exclusive privilege of any corporation by special legislation, as well as violative of section 1 of the fourteenth amendment to the United States constitution as a denial of the equal protection of the laws. The classification is likewise alleged to offend section 1 of article XI of the Illinois constitution.

The issues raised by plaintiff in regard to these constitutional provisions all relate to the question of improper classification by this amendatory enactment. The plaintiff asserts the act is in contravention of that portion of section 22 of article IV of the Illinois constitution prohibiting any local or special laws granting to any corporation

association or individual any special or exclusive privilege, immunity or franchise whatever, in that bank holding companies existing as of the effective date of the act are allowed to continue thereafter their existing ownership of bank stock. Plaintiff additionally contends that the act violates section 1 of the fourteenth amendment to the United States constitution in that it discriminates against corporations, such as plaintiff, and results in a denial of equal protection of the laws, in that bank holding companies existing on the effective date of the act and owning or controlling a majority of voting shares of a bank, may purchase additional shares of that bank without limitation, and the minority interests are denied the right to acquire the majority interest, circumstances and conditions being the same. Section 1 of Article XI of the Illinois constitution provides that all corporate laws shall be general in scope and apply to all corporations alike, and the plaintiff asserts that this act is a special law applicable only to some corporations, as it grants to some corporations the right to exist as bank holding companies and denies that right to others.

In our consideration of the power of the legislature to classify, if we find some reasonable basis for the classification it must be sustained, and the test is clearly set forth in *Thillens, Inc.*, v. *Morey*, 11 Ill. 2d 579, and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L. ed. 369. In the latter case the court held that one who assails a classification in a statute has the burden of showing that it does not rest upon a reasonable basis but is essentially arbitrary. Therefore the question to be decided is whether or not the legislative classification in the Bank Holding Company Act of 1957 is based upon some reasonable basis.

(Appendix)

Banking is a business peculiarly affected with a public interest. Local autonomy of banks serving the individual and commercial needs of a community has been impliedly the policy of this State since the 1929 amendment to the Illinois Banking Act (Smith-Hurd Stat. 1929, chap. 16½, par. 9) enacted following the passage by Congress of the McFadden Act which, in effect, permitted the States to determine whether State or national banks operating within a State might maintain branches. Branch banking in Illinois has been prohibited for many years.

It is clear that this prohibition could be circumvented and indirect branch banking result if, through ownership of bank stock, one or more bank holding companies could control several banks. Branch banking can be accomplished by one bank operating at several locations or by one company owning or controlling several banks variously located.

In 1956 Congress adopted legislation regulating bank holding companies (12 U.S.C., pars. 1841 *et seq.*) and provided, among other things, that its action should not impair the then jurisdiction of the States, and further specifically provided that administration of the Federal act should be within the confines of State law if any. The Illinois legislation, as well as legislation in New York, New Jersey, Pennsylvania and Indiana, is an acceptance of the suggestion implied in the Federal act that the States should act if, as a matter of policy, bank holding company legislation more restrictive than the Federal act was desired by the States. Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field. *People ex rel. First Nat. Bank* v. *Brady*, 271 Ill. 100; *American Legion Post No. 279* v. *Barrett*, 371 Ill. 78.

(Appendix)

The Illinois act, viewed in this background, appears to be legislation responsive to the policy determination that further concentration of bank ownership and control would be destructive of the autonomy of unit banks and undesirable. The legislature has not decreed that there be divestiture of existing holdings of companies classified as bank holding companies, but rather that the concentration as it now exists has gone far enough.

We find nothing arbitrary in the exemption of the existing bank holding company for, as we have indicated, the evil here sought to be remedied is the further concentration of control, and this is reached, reasonably, by the institution of the prohibition against further acquisition. Neither the fourteenth amendment nor the Illinois constitution forbids statutes and statutory changes to have a beginning, nor does either prohibit reasonable discrimination between rights as of an earlier time and rights as they may be determined at a later time. (*Sperry & Hutchinson Co.* v. *Rhodes,* 220 U.S. 502, 55 L. ed. 561.) Certainly the legislature has a right to make a distinction in its enactments between existing rights and conditions and rights and conditions that may exist in the future. This legislative prerogative is abundantly clear in the decisions relating to zoning cases and existing nonconforming uses (*Douglas* v. *Village of Melrose Park,* 389 Ill. 98) and statutes containing so-called "grandfather clauses," as in prohibitory or licensing provisions excepting existing businesses, professions, *et cetera. Gadlin* v. *Auditor of Public Accounts,* 414 Ill. 89; *Elliott* v. *University of Illinois,* 365 Ill. 338; *Williams* v. *People,* 121 Ill. 84; *People ex rel Dyer* v. *Walsh,* 346 Ill. 52.

Therefore it is apparent from the foregoing decisions that the mere failure of the legislature to here decree a divestiture of the existing holdings of companies clasified

as bank holding companies does not make this legislation unconstitutional.

An examination of the complaint here fails to disclose any allegation to the effect that bank holding companies, if any were in existence on the effective date of the act, held any such amounts of bank stock that threatened the generally independent structure of the Illinois banks. Nor is there any proof of facts in the record, since this case comes here on the pleadings, to that effect. In this state of the record this court is obliged to assume that the character of bank holding companies in existence on the effective date of the act was such that divesture of bank holdings was not required. "Legislators come from all parts of the State, from all walks of life and will be presumed to know existing conditions." (*Krebs* v. *Board of Trustees*, 410 Ill. 435.) Therefore, we find nothing arbitrary or unreasonable in the act in the exemption of the existing bank holding company, nor does such action on the part of the legislature make the act here unconstitutional.

The classifications provided in this act are thus clearly based upon a reasonable basis, and constitute no special legislation, deny no equal protection of the laws, and grant no privilege or immunity in effecting such classification, in violation of constitutional provisions.

The plantiff claims that this act is not regulatory but is strictly prohibitive in character, prohibiting one class of business from engaging in a business which another class may continue to enjoy. We have above demonstrated that regulatory legislation may nevertheless continue to permit existing uses and occupations. Moreover, each class of companies is regulated by this act. Bank holding companies, as defined in the act, may not thereafter acquire more than five per cent of the stock of any other bank in

which they do not hold or control 15 per cent of the voting stock at the effective date of this act; and other companies can buy up to 15 per cent of the stock of any number of banks but may not exceed that percentage of ownership or control in any bank. The public policy of Illinois prohibits branch banking, and this act merely regulates these two classes of companies to limit further encroachment upon that prohibition.

Plaintiff further asserts that the act violates section 2 of article II of the constitution of Illinois, which provides that no person shall be deprived of life, liberty, or property without due process of law, and likewise violates section 14 of article II of the Illinois constitution and section 10 of article I of the constitution of the United States, which provide that no law impairing obligation of contracts shall be passed. In support of this claim, it is asserted that the plaintiff is invested by its charter with contract and property rights among which is the right to exercise the contractual right to subscribe for additional shares of the capital stock of any bank in which it may have a stock interest, or to accept shares of stock of any bank in which it is a stockholder, which are declared, paid and distributed as stock dividends, and that the act denies them their right, thus depriving them of their property without due process, and contrary to the above sections of the Illinois constitution. The circuit court sustained these contentions.

The holding of the circuit court that the 1957 enactment was a law impairing the obligation of contracts and therefore violative of the United States and Illinois constitutions is thus based on its determination that presently existing corporations which hold bank stock should be precluded from exercising their pre-emptive rights as shareholders to subscribe additional shares. In the first place, a

careful examination of the complaint does not show the allegation of facts sufficient to raise this question, and secondly, it has not been demonstrated that there is any prohibition against the exercise of pre-emptive rights, for ordinarily the subscription of additional shares by shareholders does not alter the existing situation with reference to control. If the circuit court was concerned not with the pre-emptive right question but with the diminuation of the plaintiff's charter powers by this legislation, the holding is erroneous for the reason that no corporation has a constitutional right to be a corporation and it is fundamental that corporate powers or charters are taken subject to the prerogative of the State to modify or amend the enabling legislation at any time. (*Kreicker* v. *Naylor Pipe Co.* 374 Ill. 364.) And this matter is removed from the sphere of constitutional consideration by reason of the express language of the Business Corporation Act (Ill. Rev. Stat. 1957, chap. 32, sec. 157.162) which reserves to the General Assembly the power to repeal, amend or modify the act and to impose limitations or restrictions at the pleasure of the General Assembly.

The title of the 1957 act is as follows: "An Act relating to and restricting the holding of stock of more than one bank, defining and prohibiting new bank holding companies, controlling the expansion of existing bank holding companies and providing a penalty for the violation thereof, and to repeal 'An Act in relation to bank holding companies, and providing a penalty for the violation thereof,' approved July 11, 1955."

Plaintiff alleged that this title does not meet the constitutional requirements of section 13 of article IV of the State constitution. This title was determined by the circuit court not to meet the constitutional requirement of that

section which requires that no legislation shall embrace more than one subject and that that subject shall be expressed in the title.

The title to the 1957 act is sufficient to convey to anyone who reads only the title that the act relates to and restricts the holding of stock of more than one bank and that the act controls the expansion of existing bank holding companies and provides penalties for the violation of the act. The title is, in fact, a summary of the legislation, and relates to only one subject matter: the concentration of control of banking.

The 1957 enactment, in our opinion, is adequately and precisely described in its title and the precise description is in our judgment more than sufficient to meet the test that the title in a general way describe the subject matter contained in the act. *Kough* v. *Hoehler*, 413 Ill. 409.

The amendment to the Business Corporation Act (Ill. Rev. Stat. 1957, chap. 32, par. 157.5) was found to be unconstitutional by the circuit court for the sole reason that it was dependent by its own terms upon the operation of the Bank Holding Company Act, and since the court held the latter act to be unconstitutional it struck down the amendment to the Business Corporation Act. Inasmuch as we find the Bank Holding Company Act to be constitutional and complete within itself, it necessarily follows that the companion legislation is not invalid for the reason assigned by the circuit court. No other reasons have been urged in this court for the invalidity of said act, and we deem it unnecessary to discuss in any detail the terms or provisions of that enactment for the reasons hereinabove stated. The judgment order of the circuit court of Cook County finding the above two acts of the 1957 legislature to be invalid is reversed.

Appendix "C".

Final Judgment and Order Denying Rehearing.

Be It Remembered, that, to-wit: on the 18th day of September, 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Braeburn Securities Corporation, an Illinois corporation, Appellee, vs. Elbert S. Smith, Auditor of Public Accounts of the State of Illinois; Latham Castle, Attorney General of the State of Illinois, and Benjamin S. Adamowski, State's Attorney of Cook County, Illinois, Appellants.	No. 34811 Appeal from Circuit Court Cook County 57C12149 Error to

And now, on this day, this cause having been argued by counsel, and the court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid

the judgment of the Circuit Court of Cook County in this behalf rendered, Be Reversed, Annulled, Set Aside And Wholly For Nothing Esteemed.

And it is further considered by the Court that the said appellants recover of and from the said appellee costs by them in this behalf expended to be taxed, and that they have execution therefor.

Be It Remembered, that, to-wit: on the 24th day of November, A.D. 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Braeburn Securities Corporation, an Illinois corporation,
Appellee,
No. 34811 vs.
Elbert S. Smith, Auditor of Public Accounts of the State of Illinois; et al., etc.,
Appellants.

Appeal from Circuit Court Cook County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX "D".

Statutory Provisions Involved.

An Act relating to restricting the holding of stock of more than one bank, defining and prohibiting new bank holding companies, controlling the expansion of existing bank holding companies and providing a penalty for the violation there, and to repeal "An Act in relation to bank holding companies and providing a penalty for the violation thereof", approved July 11, 1955. Approved July 5, 1957. (The Bank Holding Company Act of 1957).

Section 1.

It is held to be in the public interest that competition prevail in the banking system and to that and that the independence of unit banks be protected.

Section 2.

Unless the context requires otherwise, (a) "Bank" means any national banking association or any bank. banking association or savings bank located in Illinois, whether organized under the laws of Illinois, the laws of another state or the laws of the United States. (b) "Company" means any corporation, business trust, voting trust, association, partnership, joint venture, or similar organization, but shall not include (1) an individual or (2) any corporation the majority of the shares of which are owned by the United States or by any State or any corporation or community chest fund, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation. (c) "Bank holding company" means

any company (1) which directly or indirectly owns or controls 15 per centum or more of the voting shares of each of two or more banks or of a company which is a bank holding company by virtue of this Act, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 15 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees. Notwithstanding the foregoing, (A) no company shall be a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity arising in the ordinary course of business; (B) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of bank shares and which are held only for such period of time as will permit the sale thereof upon a reasonable basis; (C) no company shall be a bank holding company by virtue of its ownership or control of shares acquired and held in the ordinary course of securing or collecting a debt previously contracted in good faith.

Section 3.

It shall be unlawful

(1) for any action to be taken hereafter which results in a company becoming a bank holding company as defined in this Act;

(2) for any bank holding company hereafter to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank, except that a bank holding company may acquire additional shares in a bank in which such bank holding company owned or

controlled a majority of the voting shares prior to such acquisition.

Section 4

Any company which willfully violates any provisions of this Act shall, upon conviction, be fined not less than $500 nor more than $5,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this Act shall, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both.

Section 5

If any provision of this Act or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Section 6

This Act shall be known and may be cited as "The Bank Holding Company Act of 1957".

An Act to revise the law relating to corporations for pecuniary profit as amended (Section 5 of the Business Corporation Act).

(Italics added to indicate the language added by the 1957 amendment.)

Section 5.

Each corporation shall have power: • • •

(Appendix)

To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, *provided, however, that no corporation organized under the laws of this state or licensed to transact business in this state shall directly or indirectly own or control 15% or more of the voting shares of each of two or more banks or of a company which is a bank holding company as defined in "The Bank Holding Company Act of 1957," except to the extent permitted by the provisions of that Act and except that any such corporation may continue to own or control those voting shares it owns or controls on the effective date of this amendatory Act.*

Federal "Bank Holding Company Act of 1956".

Section 2

"Bank holding company" means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this chapter, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees; and for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which

such predecessor company became a bank holding company. Notwithstanding the foregoing (A) no bank shall be a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, (B) no company shall be a bank holding company which is registered under the Investment Company Act of 1940, and was so registered prior to May 15, 1955 (or which is affiliated with any such company in such manner as to constitute an affiliated company within the meaning of such Act), unless such company (or such affiliated company), as the case may be, directly owns 25 per centum or more of the voting shares of each of two or more banks, (C) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, (D) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation, and (E) no company shall be a bank holding company if at least 80 per centum of its total assets are composed of holdings in the field of agriculture. * * *

Section 3

(a) It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such ac-

quisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956 in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition. * * *

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller Board disapproves the application in writing within said thirty days, the Board shall forth-

with give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.

(c) In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State

in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

Section 7.

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

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FILED
MAR 17 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 718

BRAEBURN SECURITIES CORPORATION, an Illinois corporation,

Appellant,

vs.

ELBERT S. SMITH, Auditor of Public Accounts of the State of Illinois; LATHAM CASTLE, Attorney General of the State of Illinois; and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION OF ELBERT S. SMITH, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND BENJAMIN S. ADAMOWSKI, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS, TO DISMISS OR AFFIRM.

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APPEAL FROM THE SUPREME COURT OF ILLINOIS.

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Appellees Elbert S. Smith, Auditor of Public Accounts of the State of Illinois, Latham Castle, Attorney General of the State of Illinois, and Benjamin S. Adamowski, State's Attorney of Cook County, Illinois, move that this appeal be dismissed on the ground that it does not present a substantial Federal question, or in the alternative, that the judg-

ment of the Supreme Court of Illinois be affirmed because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

LATHAM CASTLE,
Attorney General of Illinois,

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois,
Counsel for Appellees.

STATEMENT.

The Pleadings.

The Complaint was filed August 23, 1957. It alleges that:

Braeburn Securities Corporation is an Illinois corporation which filed its Articles of Incorporation February 6, 1956.

The Articles of Incorporation were amended on February 23, 1956, and as so amended, granted Braeburn Securities Corporation the power of purchase, own and hold the shares of capital stock of banks and bank holding companies and shares of capital stock of any non-banking corporation.

Braeburn Securities Corporation is engaged in the general investment securities business and proposes to exercise all the powers conferred on it in its Articles of Incorporation.

Braeburn specifically proposes to acquire shares of stock in two or more Illinois banks in quantities in excess of 15% of the outstanding shares of such ba ks.

The Complaint then alleges that Senate Bill 410, enacted by the 70th General Assembly of the State of Illinois and known as "The Bank Holding Company Act of 1957," and Senate Bill 411, also enacted by the 70th General Assembly and known as "An Act to Amend Section 5 of 'The Busi-

ness Corporation Act," filed July 13, 1933", are both invalid, unconstitutional and void by reason of numerous constitutional objections including the objection that the legislation violated the equal protection clause of the 14th Amendment to the Constitution of the United States.

The Complaint sought a declaratory judgment declaring the two acts invalid, unconstitutional and void.

Motions to dismiss were filed by the defendants (Abst. of Rec., pp. 16-17)[1] on the grounds that the Acts complained of are valid and constitutional.

The Decision of the Circuit Court of Cook County, Illinois.

On March 5, 1958, the Circuit Court of Cook County, Illinois entered a declaratory judgment (Abst. of Rec., pages 18-20) finding that Senate Bill 410, known as the Bank Holding Company Act of 1957, and Senate Bill 411, known as An Act to Amend Section 5 of the Business Corporation Act, were invalid

> "in that said laws violate Secs. 13 and 22 of Art. IV, Secs. 2 and 14 of Art. II, and Sec. I of Art. XI of the Constitution of the State of Illinois, and also violate Sec. I of the 14th Amendment of the Constitution of the United States."

The Decision of the Supreme Court of Illinois.

On September 18, 1958, the Supreme Court of Illinois entered a final judgment reversing the Circuit Court of Cook County. The Supreme Court of Illinois delivered an opinion finding the legislation to be constitutional.

---

[1] References to the Abstract of Record, here and elsewhere, are to the Abstract of Record filed May 8, 1958, in the Supreme Court of Illinois and designated as a part of the record by appellant's notice of appeal.

The Context of the Legislation.

In considering the present question, it will be helpful to understand the context in which the Bank Holding Company Act of 1957 was adopted by the Illinois legislature.

By the middle 1950's, it had become apparent that legislation was required to restrict the development of bank holding companies. It was felt that a further concentration of holdings by companies of bank stock would be against public interest.

State prohibitions on branch banking, moreover, could by means of bank holding companies be circumvented. Interstate bank holding companies can reach across state lines and dominate local banking institutions.

The Federal Bank Holding Company Act of 1956.

On May 9, 1956, the 84th Congress adopted the Federal Bank Holding Company Act of 1956. This was the first federal legislation enacted dealing with bank holding companies. This Act is set out in part in Appendix "D" to the Jurisdictional Statement.

The Federal Act provides that no company shall become a bank holding company except with the prior approval of the Board of Governors of the Federal Reserve System (Section 3). All bank holding companies face divestiture of non-banking interests, and their activities are limited to the management and control of banks.

One of the principal objectives of the Federal Act was to prevent any lessening of competition in the banking business. Because of the importance of the banking system to the national economy, Congress believed that adequate safeguards should be provided against undue con-

centration of control of banking activities. The House Committee Report stated:

> While our banking structure has evolved down through the years to meet changing economic requirements, this country has held steadfast to the doctrine that competition should prevail in the banking industry. Our national banking policy has aimed at protecting and fostering the growth of independent unit banks. House Committee Report No. 609, 84th Congress, 1st Session, page 2.

Although Congress has repeatedly been urged to break down the restrictions in the national banking law regarding branches of national banks and to permit branches regardless of state bank laws, Congress has left the matter of branches to the states to determine, each state for itself.

The concentration of banking control into fewer hands has been accomplished, however, to a certain extent through the holding company device whereby control of a group of banks has been acquired and the banks have been thereafter operated, in effect as branches. It was believed that the declared will of Congress in favor of independent competitive banking was being thwarted by indirect branch banking, through the mechanism of the holding company. (See page 3 of House Committee Report No. 609.) Without such legislation as this Act, the almost unrestricted ability of a bank holding company group to add to the number of its banking units made it possible for the concentration of commercial bank facilities in a particular area under a single control and management.

"Bank Holding Company" is principally defined in the Federal Act as any company "which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company" by virtue of the act (section 2). There are certain

exceptions in the definition and in section 3, some of which are copied verbatim in the Illinois Act.

Reservation of Right to States to Restrict Acquisition of Bank Stock.

The Federal Act also gives recognition to a state's right to control the ownership of banks within its boundaries. In Section 3 (d) it provides:

> "Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." May 9, 1956, c. 240, section 3, 70 Stat. 134, 12 U. S. C. A. § 1843(d).

Also included in the Federal Act in Section 7 is the following general reservation of right to the states:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." May 9, 1956, c. 240, section 7, 70 Stat. 138, 12 U. S. C. A. § 1846.

The significance of section 7 was emphasized in the report of the Senate Committee on Banking and Currency when it reported the Act:

> ". . . Another provision of this bill expressly preserves to the States a right to be more restrictive

regarding the formation or operation of bank holding companies within their respective borders than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision adequately safeguards State's rights as to bank holding companies." Senate Committee Report No. 1095, 84th Congress, 2nd Session.

Illinois is but one of the states that enacted bank holding legislation in 1957 to take advantage of the Federal Act. Among the other states are New York, New Jersey, Pennsylvania and Indiana. As far as can be ascertained none of these laws have been questioned in the courts.

The Classification Made in the Illinois Bank Holding Company Act of 1957.

The purpose of the Illinois Bank Holding Company Act is to prevent greater concentration of control over Illinois banks. The Act is thus directed at restricting companies from acquiring large stock interests in independent banks. The Act prohibits certain additional stock acquisitions. The Act does not restrict the present ownership of bank stock nor does it do away with any property rights.

Section 2(c) of the Act defines "bank holding company" as any company—

> "which directly or indirectly owns or controls 15 per centum or more of the voting shares of each of two or more banks or of a company which is a bank holding company by virtue of this Act."

The definition goes on to include companies which even though owning less than 15% of the stock, manage in other

ways to control two or more banks and provides certain exceptions not complained of in this action. The full text of the Act appears in Appendix "D" in the Jurisdictional Statement.

Section 3 of the Act makes it unlawful:

> "(1) for any action to be taken hereafter which results in a company becoming a bank holding compans as defined in this act; (2) for any bank holding company hereafter to acquire direct or indirect ownership or control of any voting share of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank. . . ."

The Act is thus directed at acquisitions. It does not expressly establish any classifications. But for the sake of making clear Braeburn's complaint there can be said to be implicit in the Act the following classification:

Class One: Companies which on the effective date of the Act owned 15% or more of the stock in (or in other ways controlled) two or more banks.

> These companies are referred to as "bank holding companies". Such a company may not acquire any additional bank stock in the banks in which it already owns 15% or more of the stock.
>
> As to any bank in which a bank holding company owns no stock or less than 5% of the stock on the effective date of the Act, the company may acquire stock so that its total holding does not exceed 5% of the bank's stock. If the company owns more than 5% of the stock of a bank, it may not acquire any more stock of that bank.
>
> A special exception permits purchase of additional shares if any company owns more than 50% of a bank's stock. Such acquisitions could not make any practical difference in the extent of control. Section 3(1).

Class Two: Companies which on the effective date of the Act did not own 15% of the stock of more than one bank.

> Such a company is prohibited from acquiring stock if it would result in the company holding a 15% stock interest in two or more banks. Such companies may hold any amount of stock in one bank, and may acquire up to 15% of the stock in any number of additional banks.

It can therefore be said that the Illinois Legislature has determined:

> (a) that the existing degree of concentration of bank stock holdings is tolerable, and that the public interest does not require divestiture of such stock holdings;
>
> (b) that additional large acquisitions of bank stock by companies will have a tendency to create conditions not in the public interest; and
>
> (c) that additional acquisitions by bank holding companies should be even more severely restricted (being limited to 5% of a bank's stock) than acquisitions by non-bank holding companies (which companies can purchase up to 15% of the stock of any bank).

By this classification the Legislature, without requiring an existing bank holding company to divest itself of bank stock effects its purpose of restricting further concentration of control of banks. There is nothing arbitrary in such a classification.

In this connection, it should be noted that bank holding companies in existence on the effective date of the Act are effectively limited in expansion in two ways. The Act limits their expansion through purchase of additional bank shares or by acquiring corporate control of an additional bank by other means, direct or indirect. At the same time, expansion of the banks themselves which are part of such a holding company group is limited by the Illinois banking

law which prohibits the establishment of branches. Chap. 16½, Ill. Rev. Stat. 1957, Section 106.

The situation is thus altogether different from a law which prohibits certain new manufacturing or commercial businesses, while permitting those engaged in the same business on the effective date of the act to continue without restriction. In such a case the manufacturing and commercial enterprise can effectively expand their operations without restriction. The nature of a holding company is different. Its "operations" consist of financial ownership and control and its growth can only take place by acquiring more bank stock. But such acquisitions are severely restricted by the Act.

The Illinois Legislature was therefore in a position to appraise the present degree of concentration of bank stock in company control in Illinois and to decide that this degree of concentration might safely continue, knowing that such companies could not expand, nor use their position in any way detrimental to the community. At the same time the Legislature decided to restrict additional bank stock acquisitions by companies, in the belief that such acquisitions might have a tendency to undermine the independence of unit banks to a point inconsistent with the public interest.

The resulting pattern of laws presents a classification not unlike that of the federal anti-trust laws. Section 7 of the Clayton Act prohibits stock acquisitions where "the effect of such acquisition may be to substantially lessen competition . . ." 15 U. S. C. § 18. As pointed out in *United States* v. *du Pont & Co.*, 353 U. S. 586, 589, "The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."

On the other hand, divestiture of stock acquired by companies prior to the adoption of the Clayton Act could only

be ordered under the Sherman Act, on proof that there was in fact such a restraint or monopoly. Because Congress did not require stock divestiture in existing situations, it was not prevented by the Constitution from restricting future stock acquisitions which might have an undesirable tendency.

What the plaintiff corporation seeks, as is evident from its charter and its allegations in the complaint (Abst. of Rec., p. 4) is *the right to buy up control in Illinois banks which are now independent.* This it is prevented from doing by the Act. But every other company regardless of when organized is also prevented from buying up the stock in these banks. The Act gives no company preference over plaintiff as to the acquisition of the stock in any independent bank.

In fact, as has been pointed out, certain companies (those companies, if any, owning 15% or more of the stock of two or more banks on the effective date of the Act) may not buy as much of the stock of any independent bank as may plaintiff.

The Illinois Legislature determined that the existing bank holding companies within the state should be frozen at their present size and, being so limited, are tolerable. But this provides no reason why the plaintiff must be given free license to acquire any amount of stock in any number of Illinois banks. Plaintiff's argument that the Constitution guarantees it such a right is without foundation.

SUGGESTIONS IN SUPPORT OF THIS MOTION TO DISMISS OR AFFIRM.

I.

The Federal questions tendered by this appeal are not substantial and do not need further argument.

The chief federal question complained of by plaintiff in its complaint and argued below is that the Illinois Bank Holding Company Act violates the equal protection clause of the 14th Amendment. Plaintiff claims that unlawful inequality results from the provisions of the Illinois law which restrict companies from additional acquisitions of bank stock. It has been pointed out the Act divides companies into two classes and restricts to different extent the additional acquisitions of bank stock by each. Companies like plaintiff which have not yet acquired 15% of the stock of 2 or more banks are *less* severely restricted as to future acquisitions than companies of the other class.

That the Act does not require divestiture of bank stock provides no grounds for complaint on a record which contains no evidence that the present degree of concentration of holdings of bank stock in Illinois is against the public interest or is in any way harmful to plaintiff.

The Supreme Court of Illinois has carefully considered the claimed violation of the equal protection clause of the 14th Amendment. Section 22 of Article IV of the Illinois Constitution prohibiting the legislative grant of special privileges has been held to involve the same test of what constitutes an arbitrary classification, as the equal protection clause of the 14th Amendment, *Stewart* v. *Brady*, 300 Ill. 425; and the claimed violations of the state and federal

constitutional provisions were considered by the Illinois court together. (See Appendix B, pp. 14a-15a, Jurisdictional Statement.)

The Illinois court pointed out the presumption in favor of legislative classification and the failure of this record to show any indications of an arbitrary character in the classification.

Plaintiff also claims that any state regulation of the holding of stock in national banks located within the state is unlawful under *McCulloch* v. *Maryland,* 4 Wheat. 316. This claim was not accepted by either the Circuit Court of Cook County or the Supreme Court of Illinois and is without merit. The rule of *McCulloch* v. *Maryland* is directed at burdensome and discriminatory interference with the operations of a national instrumentality. No such interference is present here. This claim does not present a substantial federal question. In any event this claim is not before the Court, appellant having failed to take any cross appeal from the decision of the Circuit Court of Cook County.

II.

The alleged invalidity of The Illinois Bank Holding Company Act of 1957 by reason of a federal preemption of the field of bank holding company legislation is raised for the first time in this appeal.

Nowhere in its complaint does plaintiff ever refer to the Federal Bank Holding Company Act of 1956.

The federal law as shown above, p. 6 authorizes State legislation of the kind here challenged and prohibits a bank holding company from purchasing bank stock across state

lines unless specifically authorized by the state in which the bank is located.

The plaintiff's position on this point is not only unsubstantial and contrary to the federal law, it may not even be raised at this point in the proceeding.

For the reasons stated, the appeal should be dismissed or the judgment of the Supreme Court of Illinois should be affirmed without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Raymond S. Sarnow, one of counsel for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 17th day of March, 1958, I served copies of the foregoing Appellees' Motion to Dismiss this Appeal or Affirm the Judgment of the Supreme Court of Illinois as follows:

By mailing of five copies to:

Messrs. John A. Bussian, William M. Doty, and Gerald M. Chapman,
208 South La Salle Street,
Chicago 4, Illinois,

in duly addressed envelope, postage prepaid.

RAYMOND S. SARNOW,
One of Counsel for Appellees.

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JAMES R. BROWN
Clerk

IN THE

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No. 718

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Appellees.

On Appeal From the Supreme Court of the State of Illinois.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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Appellees.

On Appeal From the Supreme Court of the State of Illinois.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Defendants' motion to dismiss or affirm approaches the classic in its subservience to the proposition that the theme of a Brief in Opposition should be "Always Belittlin'" (Weiner, *Effective Appellate Advocacy* (1950) p. 296). To achieve this objective, their "Statement"

omits, or only partially states, many of the operative facts. Since this is a brief in opposition, reiteration of the Jurisdictional Statement will be omitted. The omissions and partial statements will be listed, *seriatim*, and, then, the legal and factual fallacies in defendants' "Suggestions", discussed.

I.

DEFENDANTS' "STATEMENT", BY IGNORING SOME AND ONLY PARTIALLY STATING OTHER OPERATIVE FACTS, GIVES A DISTORTED VIEW OF THIS CASE.

1. In summarizing the complaint, defendants mention the fact that Braeburn proposed to acquire shares in two or more Illinois Banks (Motion, p. 2), omitting to mention that what Braeburn alleged it proposed to do was acquire and hold "shares of capital stock of a bank or banks created by the laws of the State of Illinois or by any other state or by the laws of the United States * * *." (Abst. 15). Then, in summarizing the grounds upon which the complaint challenged the Illinois Act, defendants specifically mention only the claimed denial of equal protection under the Fourteenth Amendment to the Constitution of the United States (Motion, p. 3), omitting to mention the claim that the Act was void because it attempts to, "restrict the right of corporations * * * to own, hold and vote shares of the capital stock of banks created by the laws of the United States * * *" (Comp., par. 6(e); Abst. 8). These seemingly innocent omissions are vital to defendants' subsequent suggestion that the effect of the Federal Bank Holding Company Act is raised for the first time in this Court (Motion, pp. 13-14).

2. In describing the "Context of the Legislation" (Motion, p. 4) and arguing its purpose (Motion, p. 7), defendants give no citation for their conclusion that it had

become apparent that the legislation was required to restrict the development of bank holding companies and that the purpose of the Act was to prevent "greater" concentration of control over Illinois banks. There is nothing in the record to support either of these conclusions.(1) The allegations of the complaint constitute the admitted facts and the only evidence on this appeal, *Williams* v. *Kaiser*, 323 U.S. 470, 89 L. ed. 398.

This particular interpretation of the background and purpose forms the foundation for defendants' attempt to justify the legislation upon the ground that it was directed against, not present, but assumed, and anticipated, hypothetical danger, not based on any demonstrated, factual evidence (Motion, pp. 10, 12). From the commentaries on the Illinois banking situation (Jur. St., pp. 14 (fn. 3), 34-5), the purpose of the legislation might equally be said to be the protection of economically inefficient "unit banks" which do not adequately serve the existing public demand.

3. Throughout their "Statement", defendants seek to equate "bank holding company" with "branch banking," implying that the former is merely an evasive device

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(1) Of course, certain parts of the Jurisdictional Statement, particularly, point 4 (Jur. St., pp. 34-5), may, on the surface, appear to be subject to similar criticism. However, they are predicated upon published material and expressions of opinion of general availability, a technique recognized by this Court (**Muller v. Oregon**, 208 U.S. 412, 52 L. ed. 551; **Norman v. Baltimore & O. R. Co.**, 294 U.S. 240; 79 L. ed. 885; **See**: Bikle, "Jurisdictional Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action", 38 **Harv. L. Rev.** 6). They do not represent ideas resting only in the mind of the writer.

to be employed where the latter is prohibited (Motion, pp. 5, 9, 10, 11). Again, they cite no authority for this proposition and ignore the fact that it is at variance with the opinions of bankers and economists which were brought to this Court's attention (Jur. St., pp. 30, 34). By so doing, they seek to take advantage of the legislative policy of Illinois against branch banking(2) (Motion, p. 5). Through the maintenance of separate legal entities for each of the banks in which a holding company is interested, the claimed evil of remote management, not amenable to local control, is avoided in a holding company system. Thus, the benefit of the unit bank to the public is combined with increased efficiency and stability under a federally regulated holding company. (*See*: Jur. St., p. 33; *Federal Bank Holding Company Act of 1956*, 12 U.S.C. § 1841 *et seq.*)

Therefore, defendants' argument, premised upon an identification of the two methods, is unfounded in fact. This argument furnishes a basis for defendants' contention that further expansion of holding companies would be inconsistent with the public interest (Motion, p. 10). However, it ignores the fact that, *vis a vis* state banks, the question in this case is not the inherent evils, if any,

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(2) General acceptance and continuation of this policy is uncertain. Currently pending in the Illinois Legislature, is the so-called Randolph Bill which would, in effect, legalize branch banking in the Metropolitan Chicago Area (H. B. 108, introduced February 10, 1959). Recently, a committee of Chicago businessmen was formed to support this legislation, its founders stating that the reason for the committee's formation was the need for additional banking facilities in the Metropolitan Chicago Area ("68 Executives Here Back Branch Banks", **Chicago Daily News**, March 25, 1959, p. 47, cols. 5-7).

of holding companies, but rather, whether a state legislature, under the equal protection clause, can, in effect, say that only certain corporations can be bank holding companies within the state (Jur. St. 25-7), *i. e.*, those existing on the effective date of the Act, while denying the right to other corporations, such as Braeburn.

4. In discussing the reservation of rights to the states in the Federal Bank Holding Company Act (Motion, pp. 6-7), defendants entirely ignore the fact that, under Section 3(b) of the federal act, a state's intervention in opposition to a holding company's being recognized thereunder is not conclusive, even where state bank stock is to be acquired (12 U.S.C. § 1842(b)). They likewise ignore the implications for the construction of Section 7 of the federal act of the fact that Congress found it necessary to insert Section 3(d) in that act (Jur. St., pp. 32-3). As a result, they avoid consideration of the conflict between state and federal power with respect to national banks (Motion, p. 13).

5. In discussing the classification under the Illinois Act, defendants state that the permission of additional acquisitions where a holding company already owns 50% of a bank's stock, "could not make any practical difference in the extent of control", (Motion, p. 8). Without detailing situations where more than 50% control is required for corporate action, the common sense observation that the greater the control, the less the possibility of irregular or improper action being challenged by a stockholder's suit, demonstrates the fallacy of this assertion.

II.

DEFENDANTS' ARGUMENTS WITH RESPECT TO THE "EQUAL PROTECTION CLAUSE" PERPETUATE THE MISUNDERSTANDING OF THE DISTINCTION BETWEEN THAT CONSTITUTIONAL PROVISION AND THE "DUE PROCESS CLAUSE" WHICH PERVADED THE ILLINOIS COURT'S OPINION.

In suggesting that the federal questions are insubstantial, defendants rely upon the propositions that (1) the Illinois Act preserves sufficient equality by prohibiting only future expansion of existing bank holding companies, and (2) that the Illinois Supreme Court carefully considered the equal protection clause issue, (Motion, p. 12). Actually, their argument on this point begins in their "Statement" on page ten of the motion. There, they assert that the Illinois legislature decided that the present degree of concentration might safely continue but that expansion was improper, relying upon a claimed distinction between holding companies and manufacturing or commercial enterprises.

Their fundamental fallacy is that they forget that, to justify police power legislation such as the challenged Act, the reason for the establishment of a closed class must appear on the face of the act or be suggested by the record since, in the absence of such a reason, the Court has no right to conjure up possible situations which might justify the discrimination, *Mayflower Farms* v. *Ten Eyck*, 274 U. S. 266, 274, 80 L. ed. 675, 679. The complaint alleges that the failure to regulate existing holding companies with respect to their present holdings while denying other corporations the right to acquire equal holdings was an unjustified attempt to give economic advantage to members of a closed class in violation of the equal protection clause (Abst. 5-7). In discussing the limitation on future expansion, Defendants forget that the record

does not contravene the foregoing allegations which constitute a *prima facie* showing that such was the purpose of the legislation. *Williams* v. *Kaiser*, 323 U.S. 470, 474, 89 L. ed. 398, 401. Existing bank holding companies are exempted, apparently, on a legislative hypothesis that they are not harmful to the public and, therefore, did not require regulation. Absent evidence to the contrary, it would necessarily follow as a matter of logic that new bank holding companies, being the same in structure and corporate powers, are also not harmful. But the legislature impliedly made the opposite assumption as to new bank holding companies in passing the Act. Thus the statute, *prima facie*, rests upon two inconsistent assumptions concerning the same type of business. Therefore, it is plainly arbitrary. This is substantially the same factual situation which this Court found to contravene the equal protection clause in *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed 2d 485.

The suggestion that the limitation upon expansion was sufficient, despite failure to require divestiture, to satisfy the requirements of the equal protection clause, conflicts with the holding of this Court in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. ed. 92, that a basis of classification resting upon size alone is improper. Defendants' argument implies that the Illinois legislature found that there were existing bank holding companies of a size which the Illinois Legislature found to be undesirable. Thus, since there is nothing in the record to suggest that bank holding companies act in concert or compete with each other, it would follow that, as competition for unit banks, either the claimed evils already existed in areas served by bank holding companies, or they did not. If the former is true, divestiture should be required. If the latter, the size of the holdings alone becomes an improper

criterion for classification. If size is not a proper criterion, then the entire statutory scheme fails of its purpose.

Thus, even upon defendants' asserted justification, the implicit classification in the Act is arbitrary and discriminatory on its face, and falls within the prohibition of the line of closed classification decisions, culminating in *Morey* v. *Doud*, 354 U. S. 457, 464, 1 L. ed. 2d 485, where this Court supplemented the rule controlling the classification of regulatory laws as laid down in *Lindsley* v. *National Carbonic Gas Company*, 220 U. S. 61, 55 L. ed. 369, 371 by adding, "discriminations of an unusual character, especially suggest careful consideration, to determine whether they are obnoxious to Constitutional provision; *Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 37, 38, 72 L. ed. 770, 774." This Court has also recognized that "Arbitrary selection can never be justified by calling it 'classification,' " *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679. Applying these rules, the allegations of the complaint make out a clear case of discrimination in favor of bank holding companies existing on the date of the Act, resulting in a denial of equal protection to Braeburn.

Defendants attempt to justify their reasoning by analogy to the Clayton and Sherman Acts. (Motion, pp. 10, 11) This analogy demonstrates that in this motion defendants have perpetuated the misconception of the difference between "due process" and "equal protection" questions manifested by the Supreme Court of Illinois in the instant decision when it relied upon *Sperry & Hutchinson* v. *Rhodes*, 220 U. S. 502, 55 L. ed. 561. (See: Jur. St., pages 27-29). The Clayton and Sherman Acts are federal legislation and subject to the limitations upon the legislative power contained in the Fifth Amendment, not the Fourteenth. Defendants' analogy is invalid because

they do not recognize the fact that the Fifth Amendment has no equal protection clause. *Detroit Bank* v. *United States*, 317 U. S. 329, 337-8, 87 L. ed. 1774.

Significantly, defendants' motion is characterized by an absence of citation to prior decisions of this Court. In view of the many "closed class" cases cited in the Jurisdictional Statement (Jur. St., pp. 26-7), this omission implies that there are not authorities to the contrary. It is also significant that defendants completely ignore, and totally fail to explain the applicability of, *Sperry & Hutchinson* v. *Rhodes*, 220 U. S. 502, 55 L. ed. 561, upon which the Illinois Supreme Court predicated its decision as to the Federal Constitutional issue and which was shown to be inapplicable in the Jurisdictional Statement (Jur. St. pp. 27-30).

Finally, defendants manifest their misconception of plaintiff's argument by asserting that what plaintiff seeks is the unrestrained right to "buy or control any Illinois banks which are now independent" or "free license to acquire any amount of stock in any number of Illinois banks" (Motion, p. 11). This is false. Braeburn relies upon the principle that, while the legislature may classify, it may not, under the guise of classification, decide who may continue in the business and *prohibit* others from engaging in the same business under the same conditions. Despite defendants' contention, this rule is equally applicable to manufacturing, commercial and banking businesses. They each constitute commerce. With respect to the right to hold stock in State banks, Braeburn does not contend that a general prohibition of holding companies would be subject to the vices asserted here. Braeburn simply contends it is entitled to acquire and hold bank stock to the same extent as existing bank holding companies, without regard to the date of acquisition.

III.

DEFENDANTS FAIL TO RECOGNIZE THE EFFECT OF STATE REGULATION OF STOCK HOLDINGS IN NATIONAL BANKS UPON THE ACCESS OF NATIONAL BANKS TO SUPPLIES OF ADDITIONAL CAPITAL.

Defendants' only answer to Plaintiff's contention that Congress may not abdicate its power to determine who may own stock in national banks to the states in which such banks are located is that the authorities relied upon are only applicable to "burdensome and discriminatory interferences" and that the issue is not before this Court since this contention was rejected by the trial court and plaintiff did not cross appeal ([3]) (Motion, p. 13).

Without reference to the other authorities cited (Jur. St. p. 32), defendants' substantive error is caused by their misconception of the basis of decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. In that case, the validity of a Maryland statute regulating the denominations in which notes could be issued by a bank which was not authorized to do business by the State Legislature

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([3]) In contending that a cross appeal was necessary, defendant misconceives Illinois law. The trial court specifically held that the challenged Acts were invalid (Abst. 20). In Illinois, a party who is successful in the trial court may not appeal because he does not agree with the reasons, findings or conclusions enunciated by that court. However, he has a right to sustain the decision on review upon any grounds warranted by the record, and is not limited to the reasons relied upon by the trial court. **Illinois Bell Telephone Co. v. Commerce Commission**, 414 Ill. 275, 111 N.E. (2d) 329. Thus, plaintiffs could not have taken a cross appeal; as defendants admit, plaintiff renewed this contention before the Illinois Supreme Court. The first time plaintiff had to assert this contention after alleging it in its complaint, other than in briefs and arguments, was in the Notice of Appeal to this Court. This was done (**See**: Point "E", Jur. St., p. 10).

and imposing a stamp tax upon the issuance of such notes was challenged by the cashier of a branch of the Bank of the United States.

After determining that Congress had power to establish the Bank of the United States, Mr. Chief Justice Marshall held that the tax could not be constitutionally applied to a branch of the Bank located in Maryland. In so doing, he rejected the argument advanced by these defendants at page 428 of Wheaton's reports, and continued by distinguishing between exercises of state power which applied to the operation of a national instrumentality and those which did not (pages 436-7 of Wheaton's reports) because, "* * * the power to tax involves the power to destroy; * * * the power to destroy may defeat and render useless the power to create. * * *" (page 431 of Wheaton's reports).

Under the present statutory scheme of privately capitalized national banks, the power to create is exercised by the creation of an investment opportunity. Bank holding company stocks, as investments, find a much more ready acceptance on the market than bank stocks. As a result, state legislation prohibiting bank holding companies from acquiring stock of national banks located within the state, if valid, interferes with such national banks' operations by denying them access to the capital market on an equal basis with national banks in states where no such legislation exists. (*)

(*) Nadler & Bogen, **The Bank Holding Company** (N.Y. Univ., 1959) pp. 35-7 where the authors point out that, and explain why, bank holding company shares are much more readily marketable than the shares of individual banks. For an explanation of why this fact supports the statement made in the text, see Appendix 1, **infra**.

IV.

DEFENDANTS IN EFFECT CONCEDE THAT THE QUESTION OF FEDERAL PREEMPTION OF THE FIELD OF BANK HOLDING COMPANY LEGISLATION IS A SUBSTANTIAL QUESTION WHICH WARRANTS THIS COURT'S TAKING JURISDICTION OF THIS CASE.

Unable to answer plaintiff's contentions on this point (Jur. St., pp. 32-3), defendants content themselves with the assertion that the question may not be raised in this Court (Motion, pp. 13-14). Apparently, they neglected to read the decisions of this Court and the opinion of the Supreme Court of Illinois in this case. The Illinois court said (Jur. St., App. "B", p. 16a):

> "In 1956 Congress adopted legislation regulating bank holding companies (12 U.S.C., pars. 1841, *et seq.*). • • • The Illinois Legislation • • • is an acceptance of the suggestion implied in the Federal act that the States should act if, as a matter of policy, bank holding company legislation more restrictive than the Federal act was desired by the States. *Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field.* • • •" (emphasis supplied).

Without referring back to the Complaint (Abst. 8) or the decision of the trial court (Abst. 16), this disposes of defendants' contention. The Illinois court passed squarely upon this issue. When that happens, the question as to the timely raising of a federal question disappears and an irrebuttable presumption that it was properly raised arises, (*Whitney* v. *California*, 274 U. S. 357, 360-1, 71 L. ed. 1095; *Manhatton Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134, 58 L. ed. 1245). In *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 185-6, 89 L. ed. 857, this Court said:

"For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court • • • (the state court of last resort) • • •"

CONCLUSION.

For the above and foregoing reasons, defendants' motion to dismiss this appeal or affirm the judgment below summarily is without merit. The motion should be denied, jurisdiction should be accepted, and this Court should proceed to a full hearing on the merits of the cause.

Respectfully submitted,

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APPENDIX I.

STATE LEGISLATION PROHIBITING BANK HOLDING COMPANIES FROM ACQUIRING NATIONAL BANKS' SHARES INHIBITS THE LATTERS' ACCESS TO CAPITAL.

At page 11, *supra,* of this brief, the statement is made that the effect of prohibiting bank holding companies from acquiring shares of national banks in a given state is to deprive such banks of access to capital on an equal basis. Nadler & Bogen, *The Bank Holding Company* (N.Y. Univ., 1959) pp. 35-7 is cited as authority for this statement. They compare bank holding companies and unit banks from the point of view of the stockholder. Although the quantitative data given by the authors are "spot" prices, its correlation with what could be anticipated from the qualitative analysis renders it useful for this purpose. This data supports the statement made in the reply for the following reasons:

1. In addition to stating the qualitative reasons why bank holding company shares are much more readily marketable than those of unit banks, the authors point out the foliowing quantitative facts:

(a) On June 30, 1958, eight major bank holding company stocks sold for an average price of 10.5 times net operating earnings. Stocks of individual banks with assets of from $20 million to $50 million were quoted at various prices, some ranging from ratios of 7 or less times earnings, and a group of ten selected individual bank stocks had price-earnings ratios of 8.8.

(b) Dividend payout ratios were 53.1% for eight bank holding companies, 49.4% for all insured commercial banks, and 44.4% for country bank members of the Federal Reserve System in 1957.

(c) Stocks of smaller banks were quoted at substantial discounts from book value on June 30, 1958 in many instances, whereas the average ratio of price to book value per share for eight bank holding companies was 100.2%.

2. In a holding company system, the cost of capital to the parent company can be taken as roughly synonymous with the cost of capital to the members of the system. The tests cited above are standard tests for the determination of the ease with which capital can be attracted, indicating that the investor is willing to pay more per dollar of earnings for stock in a bank holding company than he is for stock in a small unit bank. Thus, it is easier for a holding company to attract capital than it is for an individual bank.

3. It may well be argued that where bank stock is held as an investment *per se*, rather than as the means of obtaining and retaining management positions, smaller unit banks are not competitive with other investment opportunities of the same, or less risk, whereas holding companies are. For instance, a ten year study of the common stock of nine independent telephone companies (*) shows the following comparable figures for the period 1948-1957:

(*) The nine companies included are: California Water & Telephone; Central Telephone: Lincoln Telephone & Telegraph; Northern Ohio Telephone; Peninsular Telephone; Rochester Telephone; Southwestern States Telephone; United Utilities; West Coast Telephone. The data was computed from **Moody's Public Utilities Manual** for the appropriate years. Average capitalization of these companies was approximately $58,700,000. The period 1947-1958 was selected to include both high and low prices for utility securities.

(a) The nine companies had an average price-earnings ratio of approximately 9.3 times during the period covered.

(b) The same companies had an average dividend payout ratio of 58.7%.

(c) Each telephone stock had market values which were substantially above book values.

4. The data set forth in paragraphs one and three of this appendix cannot be taken as indicating that a state statute prohibiting utility holding company investment in national banks would free additional capital for the individual unit banks of that state because (a) the flow of capital does not recognize state boundaries, and (b) even if it did, the unit banks could not compete, as investments *per se*, with other investments, such as the nine independent telephone companies. Thus, it can only be concluded, giving primary emphasis to the price-earnings ratios which represent the closest appraisal of the informed investor's opinion of the investment potentiality of a stock, that the bank holding company makes capital available to a national bank more cheaply and freely than it is to either the nine independent telephone companies or the unit banks. The converse is true of the relationship of unit banks and the nine telephone companies as investment opportunities.